

CHAPTER VII

EMPLOYMENT

Section 16. Remedy

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A. Legal Standards for Remedy (Issue IV)

1. The Scope of This Section

This section discusses general rules pertaining to the availability of various remedies in employment cases and explains what the Commission expects the Department and respondent to prove in order to obtain or to bar such remedies. It also discusses the legal standards and evidence applicable to each type of remedy and explains how Issue IV should be analyzed in light of the legal standards.

## 2. The Legal Standards

The FEHA, Commission regulations, precedential decisions, and court cases (see Section 2 and "Explanation of Analytical Outline" for a listing of these decisions) have established the following legal standards for Issue IV, Remedy:

### IV. Remedy

#### A. Relief to Complainant

Once a violation of the FEHA has been proven at a public hearing, the complainant is entitled to all forms of relief that will make him or her whole or will compensate the complainant for any loss or injury suffered as a result of the respondent's unlawful actions. In order to obtain an order from the Commission for such relief, the Department must show the nature and extent of the complainant's loss or injury. The respondent, in turn, may demonstrate any bar or excuse it asserts to any part of the relief claimed.

##### 1. Placement

###### a. Loss or Denial of Job

In order to obtain an order from the Commission that the complainant be hired or reinstated in a job, the Department must show that the complainant was denied or lost the job in question because of the respondent's unlawful discrimination. (This should have already been shown under Issue II above.)

###### b. Bars to Placement

Wholly Independent Reason for the Adverse Action as a Bar to Placement: The respondent may bar placement of the complainant if it can prove by clear and convincing evidence that it certainly would have taken the adverse action against the complainant for other independent reasons, even if it had not taken the adverse action because of the complainant's protected status.

Respondent's Inability to Hire or Reinstatement as a Bar to Placement: Respondent may bar placement if it can show that circumstances exist that prevent it from hiring or reinstating the complainant (e.g., job ceased to exist, complainant would have been laid off anyway later).

##### 2. Back Pay

###### a. Pay Loss

In order to obtain an order from the Commission for back pay, the Department must show that the complainant lost pay because of the unlawful discrimination and must show the extent of that loss.

b. Bars or Limits to Back Pay

Wholly Independent Reason for the Adverse Action as a Bar to Back Pay: The respondent may bar the amount of back pay claimed if it can prove by clear and convincing evidence that it certainly would have taken the adverse action against the complainant for other independent reasons, even if it had not taken the adverse action because of the complainant's protected status.

Offsets: Respondent can reduce the back pay award by amounts that the complainant actually received but would not have received had the complainant been working for the respondent (e.g., actual interim earnings).

Interruptions or Early End to the Back Pay Period: The respondent may show on various grounds that the back pay period claimed by the Department should be interrupted or shortened.

Failure to Mitigate as a Bar or Limit to Back Pay: The respondent may bar all or part of the back pay claimed if it can prove by a preponderance of evidence that the complainant failed adequately to mitigate his loss of income by using reasonable diligence in seeking and keeping subsequent employment that was suitable and available and for which the complainant was qualified.

3. Front Pay

a. Pay Loss

To obtain an order from the Commission for front pay, the Department must show either: 1) that the complainant currently works for the respondent, or will be reinstated to a position with respondent, and the complainant deserves to be placed in another, higher paying position, that the higher position will not be available for some period after the time the complainant deserves to be placed in it, and that the complainant will therefore lose pay while waiting to get into the higher position; or 2) where placement has been ordered, that such placement is not in the complainant's best interest because working conditions would be too hostile, and that the complainant will suffer a pay loss by not being hired or reinstated.

b. Bar to Front Pay

When reinstatement is barred because the respondent can prove a wholly independent reason for the adverse action or an inability to reinstate (see A.1.b, above), front pay will also be barred.

#### 4. Benefit Losses

##### a. Loss

The Department can obtain an order from the Commission for the monetary value of benefit losses by showing that the respondent's unlawful actions deprived the complainant of some employment benefit (e.g., medical insurance), that the absence of that benefit caused a monetary loss (e.g., medical expenses), and by showing the amount of the loss.

##### b. Bar or Limits to Benefit Losses

Wholly Independent Reason for the Adverse Action as a Bar to Compensation for Benefit Losses: The respondent may bar compensation for benefit losses if it can prove by clear and convincing evidence that it certainly would have taken the adverse action against the complainant for other independent reasons, even if it had not taken the adverse action because of the complainant's protected status, and that the complainant, therefore, would not have had the benefit in question and would have suffered the loss anyway.

Other Circumstances as a Bar or Limit to Compensation for Benefit Losses: The respondent may show that other circumstances would have deprived complainant of the benefit in question, and that the complainant, therefore, would have suffered the loss anyway.

#### 5. Loss of Experience

##### a. Loss

In order to obtain an order from the Commission for compensation for loss of experience, the Department must prove that the respondent's unlawful conduct caused the complainant to lose actual, practical work experience that the complainant cannot regain even if given the job in question in the future, and must show the value of that experience to the complainant.

##### b. Bars or Limits to Compensation for Loss of Experience

Wholly Independent Reason for the Adverse Action as a Bar to Compensation for Loss of Experience: The respondent may bar compensation for loss of experience if it can prove by clear and convincing evidence that it certainly would have taken the adverse action against the complainant for other independent reasons, even if it had not taken the adverse action because of the complainant's protected status, and that the complainant, therefore, would have lost the experience anyway.

Other Circumstances as a Bar or Limit to Compensation for Loss of Experience: The respondent may show that

other circumstances would have deprived the complainant of the job in question, and that the complainant, therefore, would have suffered a loss of experience anyway.

6. Other Monetary Losses

a. Loss

The Department may obtain an order from the Commission for compensation for any other monetary losses by showing that the loss occurred because of the respondent's unlawful actions.

b. Bars or Limits to Compensation for Other Monetary Losses

The respondent may be able to show bars or limits to some remedies of this sort (see "Explanation of Analytical Outline," question A.6.b.).

B. Affirmative or General Relief

The Department may obtain an order from the Commission for numerous types of affirmative or general relief to benefit other persons in addition to the complainant.

NOTE: This section is limited to a review of the remedies that may be ordered by the Commission. However, DFEH settlement agreements negotiated prior to hearing may include provisions that go beyond those which the Commission can order (i.e., emotional distress damages). This enables the Department to facilitate settlement when the parties use DFEH as a vehicle to avoid a lawsuit.

While "actual" or "compensatory" damages (e.g., pain, distress, emotional suffering) are available from the Commission in housing cases, only "equitable" relief (make the victim whole and correct the practice) is available in employment. While punitive damages (\$1,000, adjusted for the Consumer Price Index) are available in housing cases, no such damages are available in employment. Both unlimited punitive damages and unlimited compensatory damages are available, however, as the result of a lawsuit filed under the FEHA.

In negotiating DFEH settlements, all possible remedies should be considered.

B. Analysis of Remedy (Issue IV)

The following analytical outline contains typical Issue and relevant questions for the analysis of Issue IV, Remedy.

## 1. Analytical Outline

### IV. Remedy

What remedy is proper?

A. To what remedy is the complainant entitled?

1. To what placement is the complainant entitled?

- a. Did the complainant lose a particular job (and seniority and attendant benefits) because of the respondent's unlawful actions (see Issue II)?
- b. Is there a bar to placement?
  - 1) Would the respondent's wholly independent reason for the adverse action bar the placement to which the complainant is otherwise entitled?
  - 2) Would the respondent's inability to hire or reinstate bar placement?

2. To what back pay is the complainant entitled?

- a. How much pay (expected earnings) did the complainant lose as a result of the respondent's unlawful discrimination?
- b. Are there bars or limits to back pay?
  - 1) Would the respondent's wholly independent reason bar the back pay claimed (see A.1.b.1), above)?
  - 2) Are there offsets to the back pay claimed?
  - 3) Are there any interruptions or an early end to the back period?
  - 4) Does the complainant's failure to mitigate bar or limit the back pay claimed?

3. Is the complainant entitled to front pay?

- a. Would the complainant lose pay while waiting to be put into his "rightful place"? Or  
  
Should compensation be ordered in lieu of hire or reinstatement because placement is not in the complainant's best interest in that working conditions would be too hostile?

b. Is there a bar to front pay (see A.1.b., above)?

4. To what compensation for benefit losses is the complainant entitled?

- a. What loss was caused by a denial of benefits resulting from the respondent's unlawful conduct?

- b. Are there bars or limits to compensation for benefit losses?
    - 1) Would respondent's wholly independent reason for the adverse action bar compensation for benefit losses (see A.1.b.1), above)?
    - 2) Would other circumstances bar or limit compensation for benefit losses (see A.1.b.2), above)?
- 5. To what compensation for loss of experience is the complainant entitled?
  - a. Did the complainant lose work experience as a result of the respondent's unlawful discrimination, and how valuable was that experience?
  - b. Are there bars or limits to compensation for loss of experience?
    - 1) Would the respondent's wholly independent reason for the adverse action bar compensation for loss of experience (see A.1.b.1), above)?
    - 2) Would other circumstances bar or limit compensation for loss of experience (see A.1.b.2), above)?
- 6. To what compensation for other monetary losses is the complainant entitled?
  - a. What other monetary loss was caused by the respondent's unlawful actions?
  - b. Are there any bars or limits to compensation for other monetary losses?
- B. What affirmative or general relief is required?

## 2. Explanation of Analytical Outline

### IV. Remedy

#### What remedy is proper?

This is the final Issue question in the analysis of a case. Once discrimination has been proven, the Commission has broad statutory authority to fashion remedies that are consistent with the purposes of the Act.

A finding that the Act has been violated, however, does not automatically mean that most types of remedies will be granted. In many cases, the law also requires proof that a specific injury resulted from the violation and that an appropriate remedy is needed to compensate for that injury.

NOTE: For certain types of remedies, such as cease and desist orders, proof of the violation is enough to show that a remedy is due.

Issue IV asks whether such proof exists. Further, respondents will usually dispute the remedies claimed by the Department and instead will assert that no remedy (or at least a lesser remedy than that claimed by the Department) is warranted. This outline, then, focuses on what proof is needed to obtain the proper remedy and what evidence respondents may present to bar or limit such relief.

#### A. To what remedy is the complainant entitled?

Where it has been established under Issues I, II, and III that the respondent violated the Act, the complainant will be entitled to all forms of relief that will make him or her whole or will compensate the complainant for any loss or injury suffered as a result of the respondent's unlawful actions. Relief to the complainant includes, but is not limited to, placement (e.g., reinstatement, hire, transfer, etc.) and attendant benefits, back pay, front pay, compensation for loss of experience, benefit losses, or any other monetary losses, and compensatory damages for emotional injury.

In order to obtain an order from the Commission for relief for the complainant, the Department must demonstrate the nature and extent of the loss or injury resulting from the respondent's discriminatory adverse actions. The respondent, in turn, may demonstrate any bar or excuse it asserts to any part of the remedies claimed by the Department. The following questions represent the most typical remedies to which the complainant is entitled and the most typical claims asserted by respondents that would bar all or part of these remedies.

#### 1. To what placement is the complainant entitled?

- a. Did the complainant lose a particular job (and seniority and attendant benefits) because of the respondent's unlawful actions (see Issue II)?

This question asks what position, seniority, and attendant benefits would the complainant have had if the unlawful action had not occurred? If the Department has already shown under Issue II that the complainant suffered the denial or loss of a job because of the respondent's discrimination, the Department already will have shown what it needs to show, and the complainant will automatically be entitled to placement in the position the complainant would have held absent discrimination. The complainant should be restored to this position unless the respondent can show a bar to this part of the complainant's remedy (see question 1.b., below).

In most cases, the position to which the complainant is automatically entitled will have already been identified under Issue II. Simply name the job here. Do not repeat evidence already discussed under Issue II. But in other cases, in which the complainant, absent discrimination, would have normally progressed to a higher or different position from the one for which the complainant originally applied, placement to this higher position will not be automatic. The Commission will expect some proof as to why this higher placement should be made. The following example illustrates a situation in which the complainant would normally have progressed to a higher level job:

Example:

Complainant was denied a Maintenance Worker I job because of her sex. Respondent's written personnel policies indicate that there are automatic promotions in this job classification based on length of time in the job and that Complainant would have automatically progressed to a Maintenance Worker III had discrimination not occurred. This evidence can be used to show that Complainant would have progressed to this higher position.

The next examples involve cases in which the complainant might have progressed from a temporary to a permanent job:

Example 1:

In Bay Area Rapid Transit District FEHC Dec. No. 80-21, Complainant was denied a position as a temporary utility worker because of his physical handicap. Even though Complainant had applied for a temporary job, the Department requested that the Commission order Respondent to hire Complainant in a permanent utility worker position. The Department's evidence established that Complainant desired a permanent job with Respondent, that approximately 80 percent of those employees hired as temporary utility workers under the program in which the Complainant would have been hired were made permanent employees after five-and-a-half months, ten percent were discharged and ten percent voluntarily quit, and that the person hired instead of the Complainant was

appointed a permanent employee three months after his employment. From this evidence, the Commission concluded that had Complainant been hired by Respondent, he probably would have progressed to a permanent position. Therefore, the Commission ordered that Respondent hire Complainant in a permanent utility worker job.

Example 2:

In Long Beach Unified School District FEHC Dec. No. 84-29 (nonprec.), Complainant was denied a position as a one-year temporary contract teacher because of his physical handicap. Complainant had previously worked for Respondent as a long-term substitute. The Department asked the Commission to order that Complainant be hired into a permanent contract teaching position. The Commission declined to make such an order. Evidence established that most permanent contract teachers were hired from Respondent's pool of substitutes, and that the Complainant had done well as a substitute, and there was a faint suggestion in the record that Respondent was hiring more permanent teachers in the year in question. The Commission stated, however, that without much firmer evidence of Respondent's hiring needs in that period and the actual progress of similarly situated substitute and contract teachers, the Commission could not conclude with any certainty whether and when Complainant would have been hired in either a temporary or permanent contract position.

Just giving the complainant the job, however, will often not make him whole. Had the complainant had the position, he would likely have received or accrued various types of status and benefits that go with the job (e.g., accrued years of service for pension purposes, accrued vacation or sick time, various types of insurance, eligibility for stock plans, etc.). Thus, the remedy of placement also seeks to identify the "attendant benefits" that the respondent must credit to the complainant to restore to him the status he would have held had the discrimination not occurred. (These benefits are not reduced to money amounts that have to be paid to the complainant.) Monetary losses suffered because the respondent's unlawful actions deprived the complainant of an attendant benefit will be discussed below. Attendant benefits need not be investigated or proven. The Commission will automatically include them in a reinstatement order or settlement agreement. Be sure to ask the complainant what he should have at the time of reinstatement.

Do not investigate seniority. This is usually determined at the enforcement stage of a Commission order or at the time of a settlement agreement, unless, of course, seniority information is needed earlier to determine the position into which the complainant should be placed or the back pay the complainant should receive. Indicate

whether there is a union and a collective bargaining agreement which controls seniority. If one exists, the Department should amend the complaint in time to include the union as a respondent named solely for the purpose of fashioning a remedy that includes seniority.

b. Is there a bar to placement?

- 1) Would the respondent's wholly independent reason for the adverse action bar the placement to which the complainant is otherwise entitled?

Respondents often want to demonstrate that even absent discrimination, they would have done the same thing to the complainant anyway (e.g., they would have terminated or not hired the complainant), and therefore they should not be required to reinstate him. A legal doctrine has developed that permits respondents to argue this bar. Thus, even though the complainant is automatically entitled to placement, in some cases, the respondent may still be able to bar placement and other parts of the complainant's remedy, with the exception of compensatory damages for emotional injury and punitive damages, by proving that there is a wholly independent reason for the adverse action. However, in order to do so, the legal standard requires that the respondent prove by clear and convincing evidence (which is a more difficult standard to meet than a preponderance of evidence) that it certainly would have taken the adverse action against the complainant, even if no discriminatory motive had been present.

There are several different types of cases in which a wholly independent reason may bar the complainant's remedy. These cases involve situations in which there are: 1) multiple causal factors under Issue II, and 2) incomplete selection processes.

(1) Multiple Causal Factors

In most cases under Issue II, discrimination is usually shown if the complainant's protected status or protected activity was a factor in motivating the respondent to take the adverse action. Thus, it is possible to prove discrimination even if the Commission does not totally disbelieve the respondent's claimed nondiscriminatory reasons, but concludes instead that there were multiple causes of the adverse action, including both discriminatory and nondiscriminatory factors. In such cases, the respondent still has the opportunity under Issue IV to prove that one or more of these nondiscriminatory factors would still have led it to take the adverse action against the complainant, even if it never had any discriminatory motive at all. The following examples illustrate this type of case:

Example 1:

In Louis Cairo FEHC Dec. No. 84-04, the Commission found under Issue II that the Complainant's physical handicap (epilepsy) was the central if not the entire cause of her discharge and that her poor performance as a cook was at least a secondary reason for the termination decision. Under Issue IV, however, Respondent again raised Complainant's poor performance as a cook as an excuse not to reinstate her or to give her back pay. It claimed that it would have fired her anyway, even absent discrimination, because she was unqualified and unable to perform the duties of the cook job. Complainant was originally hired as a cook but was transferred to a prep cook job because of performance problems. Although the Complainant's past performance problems suggested that she might not have succeeded in the cook job, Respondent had given Complainant another chance to learn the job despite her performance problems, and would not have fired her at that point in time had she not had a seizure. The Commission ruled that this did not approach the clear and convincing proof either that she certainly would have failed or when that failure would have occurred.

Example 2:

In Smitty's Coffee Shop FEHC Dec. No. 84-25, the Commission found that Complainant's age (59) was a factor in Respondent's decision to terminate her from her waitress job and Respondent's nondiscriminatory reasons for the termination (character defects and misconduct) were not true. Under Issue IV, however, Respondent again raised these same nondiscriminatory reasons of character defects (a personality clash with another waitress) and misconduct (theft of Respondent's money) as an excuse not to reinstate Complainant or to give her back pay. Respondent claimed that it would have fired Complainant anyway absent discrimination because of these two reasons. Since the Commission had already evaluated this evidence under Issue II and had found that the complainant did not have character defects nor had she stolen any money, there was no way that this claim could bar the complainant's remedy. Respondent could not produce any evidence that came close to the clear and convincing standard required. The Commission ordered Complainant reinstated with back pay.

If the respondent raises this first type of wholly independent reason as a bar to placement, evaluate it by using the same evidence with which you evaluated the respondent's rebuttal under Issue II. For

example, the respondent claims the wholly independent reason under Issue IV that it should not be ordered to reinstate the complainant because, even if sex had not been a factor in her termination, it would have terminated her anyway because she punched her supervisor. Assess the evidence already assembled under Issue II regarding whether the complainant actually hit her supervisor and how the respondent treated others who committed similar infractions. Remember, however, that it is the respondent's burden under Issue IV to prove by clear and convincing evidence that it certainly would have taken the adverse action against the complainant, even if no discriminatory motive had been present. This means that the respondent must produce very strong evidence of what it would have done. This is a difficult burden to meet. Usually, in cases in which there are multiple causal factors, if the respondent's rebuttal evidence cannot prevail under Issue II, it most likely will not succeed later under Issue IV in barring the complainant's placement.

## (2) Incomplete Selection Process

Respondents may also assert a wholly independent reason in a second type of case involving situations in which there is an incomplete selection process. If discrimination is found under Issue II, a respondent may later claim under Issue IV that it still should not be ordered to give the complainant a remedy because, even absent discrimination, if the selection process had been completed, it would not have hired or promoted the complainant anyway because the complainant was unqualified or because of some other job-related deficiency. Thus, even though the complainant is automatically entitled to placement, if a respondent can prove this type of wholly independent reason by clear and convincing evidence, it may be able to bar placement and other elements of the complainant's remedy.

The Department, however, will usually counter this claim with evidence of the likely fate of the complainant in the selection process. What was the complainant's ranking? How do the complainant's qualifications compare to the respondent's selection criteria? How many people were hired during this period for the job in question? The more evidence the Department presents relative to how the complainant would have fared in the selection process, had it been completed, the greater the probability of obtaining placement and other relief for the complainant. Remember, the burden is on the respondent to prove by clear and convincing evidence that the complainant would not have been hired. The Department does not have to prove that the complainant would have been selected. The following examples illustrate this type of case:

Example:

In City of San Jose (Jimenez) FEHC Dec. No. 84-18, Respondent admitted under Issue II that it rejected Complainant for a firefighter position because of his physical handicap (spondylolysis).

The Commission found Respondent's affirmative defense invalid under Issue III. Under Issue IV, however, Respondent claimed that it still should not be ordered to give Complainant a remedy because the Department had not shown that if the selection process had been completed Complainant would have been hired. Respondent also claimed that, absent discrimination, Complainant would not have been hired anyway because he would have failed his background check. The Commission ruled that it was the Respondent's, not the Department's, burden to show by clear and convincing evidence that it certainly would have rejected Complainant for other independent reasons, even if it had not eliminated him because of his physical handicap. Given complainant's bilingual status, ranking among candidates, and number of candidates hired, there was every reason to conclude that Complainant would have been offered a position had he passed the medical and background examinations. Although Complainant omitted two moving violations in his background check, Respondent's witnesses could not say that this would have precluded his hiring. The Commission ruled that this fell short of the clear and convincing proof that Complainant certainly would have been rejected had his background check been completed. Further, there was no evidence that any other deficiency would have led to his rejection. Therefore, the Commission ruled that no bar existed to the hiring order and ordered Respondent to hire Complainant with back pay and seniority retroactive to the date the first group of firefighters were hired.

2) Would the respondent's inability to hire or reinstate bar placement?

The respondent may also seek to bar placement by raising the claim that circumstances exist that prevent it from hiring or reinstating the complainant.

For example, the respondent may claim that the complainant would have been laid off anyway at a later date, that the complainant's job would have been

eliminated, or that the company ceased to exist or was sold.<sup>1</sup> The Department will be expected to counter this type of claim with evidence of how the complainant would have fared had the complainant held or continued in the job in question. The Commission will want to know whether the complainant's job was in fact eliminated, whether the complainant himself or herself, rather than someone else, would have been terminated, and what happened to others when their jobs were eliminated? Were others transferred to other jobs or were they laid off or terminated? The more evidence the Department presents relative to the likely fate of the complainant, the greater the probability of obtaining placement and other elements of the complainant's remedy. Again, the Department does not have to prove that the complainant would have continued in the job. The complainant is automatically entitled to placement unless the respondent can prove by a preponderance of evidence that it is barred. The following examples illustrate this type of case:

Example 1:

In C. E. Miller Corp. FEHC Dec. No. 84-02, the Commission found that Complainant had been terminated from his job as a welding supervisor because of his race (Black). Under Issue IV, however, Respondent successor employer claimed that it still should not be ordered to reinstate Complainant because he would have been laid off anyway later. Complainant was a competent welder and supervisor with many years experience. Respondent successor employer continued to construct products that required welding. However, the evidence indicated that Complainant's job was not refilled when his replacement resigned in November 1981 and that his crew of structural welders were all laid off in October 1981. The Department introduced no evidence from which it could be determined whether Complainant would have been recalled to his former position in the normal course of events, absent discrimination. Therefore, the Commission declined to order reinstatement.

Example 2:

In Kingsburg Cotton Oil Co. FEHC Dec. No. 84-30, the Commission found that Complainant had been terminated because of her physical handicap and

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<sup>1</sup>If a company is sold, under certain circumstances a successor employer may still be held liable for the original respondent's discrimination. If successor employer liability exists, placement may not be barred. For a discussion of successor employer liability, see the "Jurisdiction" section of this manual and C. E. Miller FEHC Dec. No. 84-02.

medical condition (cancer). Under Issue IV, however, Respondent claimed that it still should not be ordered to reinstate Complainant or give her back pay because at a later date it stopped selling cotton seed by-products and the Complainant's job ceased to exist. At the time of her termination, Complainant had worked for Respondent for 23 years, 18 years as a receptionist and, for the most recent five years, as one of Respondent's three salespersons. The Department established that Complainant had a reasonable expectation that her job would continue since she had a more than satisfactory work record over a period of 23 years. The Commission found that if, as Respondent contended, some of her duties had ceased to exist, it was Respondent's burden to establish that it would have terminated Complainant, herself, rather than someone else. Respondent did not carry this burden.

Although this type of "inability to reinstate" claim may bar placement, it will not necessarily bar the entire back pay award. It may, however, shorten the back pay period and, therefore, lessen the amount of back pay due the complainant. See question 2.b.3), below.

2. To what back pay is the complainant entitled?

Once discrimination has been found under Issue II, the complainant is entitled to recover the total amount of pay lost as a result of the respondent's unlawful actions. In order to obtain this element of the complainant's remedy, the Department must show the extent of the back pay loss. The respondent, in turn, may prove the bars or limits to the back pay claim that are discussed below (see questions 2.b.1)-4). Thus, back pay is a formula by which each side supplies the elements necessary to establish its claim. If the Department does not supply its required elements, there will be no back pay award. If the respondent does not establish its side, the Commission will not reduce the amount of back pay claimed by the Department.

a. How much pay (expected earnings) did the complainant lose as a result of the respondent's unlawful discrimination?

To show the extent of the complainant's pay loss (expected earnings), the Department must usually show the time period during which the loss occurred and the expected wage or salary rate during that time period. The formula is: wage rate x number of days, months, etc., in back pay period = total expected earnings.

Calculate expected earnings in the following steps:

1) Establish the Back Pay Period

First establish the time period over which the back pay is to be calculated.

Beginning of Back Pay Period: The back pay period begins on the date of the adverse action, which is usually the day the complainant begins to lose pay as a result of the discrimination; however, it may begin later if the complainant continues to receive pay from the respondent. For example, a complainant may be terminated on a certain date but may receive two weeks severance pay. The back pay period begins, in this case, two weeks after the complainant was terminated when the complainant is no longer receiving any wages from the respondent.

In failure to hire cases, the back pay period begins on the day the complainant would otherwise have begun employment with the respondent or could have expected to have been hired. In some failure to hire cases, the starting date will be clear. In others, you may have to estimate when the complainant would have been hired based on whatever information is available about when others were hired. The starting date of the back pay period may go back as far as three years prior to the date the DFEH complaint was filed (Napa, City of, Housing Authority FEHC Dec. No. 81-12), if the violation covers that period of time. The Department is required to prove the starting date. Note that in Carnation Company FEHC Dec. No. 84-17 (nonprec.) no back pay was awarded because the Department failed to establish when the complainant probably would have been hired.

End of Back Pay Period: Where an accusation is filed, and a hearing held, the Department is able to prove the amount of pay loss only up to the time of the hearing, and the "pre-hearing back pay" period thus ends at the time of the hearing. (The Commission may also award "post-hearing back pay" from the time of the hearing to reinstatement, to be calculated by the parties at the time of reinstatement.) When calculating back pay for purposes of settlement (before any accusation is issued) the back pay period ordinarily ends at the time of placement, or if no placement is at stake, at the time of settlement.

It is the respondent's burden at a hearing to prove earlier ends to the back pay period (see below). In some cases, however, there is no dispute that the back pay period ends earlier. Where there is no dispute, calculate expected earnings based on the undisputed, shorter time period. If there is a dispute, your calculation should not reflect the earlier end to the back pay period claimed by the respondent.

2) Determine Wage Rate and Multiply

Once the pay period has been established, calculate how much the complainant would have expected to earn during that period by multiplying the complainant's wage rate (which can be established by witness testimony or payroll records) by the number of days, weeks, months, or years the complainant would have received this rate.

Example:

The back pay period is one year. Payroll records show that complainant would have earned a monthly salary of \$1,200.  $\$1,200 \times 12 \text{ months} = \$14,400$  in expected earnings.

Remember that earnings include all wages, salary, overtime and/or tips that could have been earned, commissions, bonuses, longevity pay, and all raises (from promotions or merit increases) that the complainant would have received, and any other monetary amounts that could be construed as wages, such as a monthly car allowance.

In cases in which the complainant would have received raises resulting from merit increases or promotions, the Commission will expect some evidence that these raises would have occurred. Usually, a representative from the respondent's personnel department can testify regarding the respondent's rules for raises and promotions and the normal wage increases that occurred during the time period in question for someone in the same, similar, or comparable job. The following example illustrates how expected earnings involving raises would be calculated:

Example:

Joe Smith was hired as a Service Mechanic I on June 10, 1983 at \$350 a week. He was terminated on August 13, 1983 because of his race. He was paid for that week ending on August 14. Respondent's personnel manager testified that on January 2, 1984 all of Respondent's employees received an automatic cost of living increase of 10 percent. Joe filed his DFEH complaint on August 15, 1983. Expected earnings are being calculated on June 3, 1984 as part of the total back pay calculation for a settlement agreement. Joe's expected earnings over the back pay period August 15, 1983 through June 3, 1984 are:

8-15-83 to 1-1-84 = 20 wks x \$350 wk. = \$ 7,000.00

1-2-84 to 6-3-84 = 22 wks x \$385 (\$350 + 10%) = \$ 8,470.00

Total expected earnings = \$15,470.00

In cases in which the complainant's wages, commissions, tips, or overtime pay is not a fixed amount but varies by the week or month, the Commission will project what the complainant would have earned based on an average of what the complainant actually did earn while employed with the respondent or based on an average of what someone else earned in the same, similar, or comparable job.

In some failure to hire cases, the complainant's starting salary may be clear. In others, it may have to be estimated. If such a situation arises, first determine the respondent's salary setting criteria and the complainant's qualifications. What salary did the person who was hired start at in light of her qualifications? What salary did people in similar or comparable jobs start at in light of their qualifications? Based on this information and the rules of the company, estimate what the complainant's starting salary reasonably would have been.

b. Are there any bars or limits to back pay?

Once the Department has established the extent of the complainant's back pay loss, the respondent, in turn, may bar or lessen the amount of back pay asked by the Department by proving one of the four claims discussed below.

1) Would respondent's wholly independent reason for the adverse action bar the back pay claimed?

If placement is barred because the respondent can prove by clear and convincing evidence that it certainly would have taken the adverse action against the complainant for wholly independent reasons, even absent discrimination (see discussion of wholly independent reasons under question A.1.b.1), above), then back pay is also barred.

2) Are there offsets to the back pay claimed?

The respondent is permitted to argue that the complainant's expected earnings be offset by his actual interim earnings. After the complainant's expected earnings have been calculated, subtract from the total the complainant's actual earnings with other employers during the same period in question.

(Remember, if the complainant got another job that paid consistently the same or higher than the expected earnings during some portion of the back pay period, the clock stops for that segment of time, and any money made by the complainant during that segment of

the back pay period should not be subtracted from the complainant's expected earnings.)

Respondents may also argue other offsets, such as disability benefits or Worker's Compensation awards. The Commission has ruled, however, that unemployment insurance benefits are not deductible from expected earnings (see Commission regulations Section 7286.9(a)(1)(A), County of Alameda v. FEHC (1984) 153 Cal.App.3d 508, and San Francisco Municipal Railway FEHC Dec. No. 82-23, p. 14). Welfare benefits are also not deductible (see American Airlines FEHC Dec. No. 83-15, p. 51). If the complainant received disability benefits during some or all of the back pay period, these benefits may be deductible (see City and County of San Francisco and San Francisco Municipal Railway FEHC Dec. No. 82-25, pp. 9-10). However, if the complainant was unable to work, then the back pay period will have stopped, and money received as disability benefits during this segment of time will not be deductible (see Louis Cairo FEHC Dec. No. 84-04, p. 17). On the other hand, if the respondent's discrimination caused the complainant to be unable to work, the clock will continue to run and any disability benefits received will be deductible (Kingsburg Cotton Oil Co. FEHC Dec. No. 84-30, p. 36).

Further, if the complainant went back to school because of the respondent's discrimination and received grants, grant income that was used to pay fees and other school costs that the complainant would not have incurred but for the respondent's discrimination is not deductible. A portion of the grant income that paid the ordinary costs of living, however, may be deductible. It is the respondent's burden to prove that a portion of the grant income should be deducted, and, in general, to prove any other offsets to the complainant's expected earnings (Louis Cairo, p. 18).

3) Are there any interruptions or an early end to the back pay period?

The respondent may also lessen the amount of back pay sought by the Department if it can show that there are interruptions or an early end to the back pay period.

Unavailability: The back pay period may be interrupted or may end early if the complainant is physically unable to work but may begin again when the complainant is again able. However, if it is the respondent's discrimination that made the complainant unable to work, the back pay period will not stop.

Higher Paying Job: The back pay period may also end early if the complainant gets another job that consistently pays a commensurate or higher amount than

the expected earnings. It may also start again if the complainant earns a lower salary at a later date.

Offer of Reinstatement: If the respondent makes a legitimate offer of reinstatement (one that makes the complainant whole) and the complainant turns it down, this may end the back pay period. Occasionally, the complainant will be justified in turning down such an offer, and, if this is the case, the back pay period will continue. If the complainant receives such an offer from an employer, consult the Legal staff for an opinion as to whether the offer can be refused without ending back pay liability.

Respondent's Inability to Hire or Reinstatement: If placement is barred because circumstances exist that would prevent the respondent from being able to hire or reinstate the complainant, back pay will not be barred, but the back pay period may be shortened. For example, the respondent claims that complainant's job was eliminated, or the complainant would have been laid off anyway, or the company ceased to exist or was sold. If placement is barred because the respondent can prove any one of such claims (see discussion of "Respondent's Inability to Hire or Reinstatement as a Bar to Placement," under question A.1.b.2), above), determine at what point in time the complainant's job ceased to exist, or the complainant would have been laid off, and how much this shortens the back pay period. Do not repeat evidence already discussed under A.1.b.2), above. (In the case where a company is sold, under certain circumstances a successor employer may still be held liable for the original respondent's discrimination. If a successor employer can be held liable, the back pay period may continue. For a discussion of liability of successor employers, see the "Jurisdiction" section of this manual and C. E. Miller FEHC Dec. No. 84-02.)

4) Does the complainant's failure to mitigate bar or limit the back pay claimed?

Even though the complainant has a duty to mitigate his or her income loss (and should be informed of such at the time the complainant files the complaint), if the respondent does not claim that the complainant failed to so mitigate, the Commission will automatically order the full amount of back pay established by the Department under question 2.a., above. However, if the respondent does claim a failure to mitigate, it may be able to bar all or part of the back pay claimed if it can prove (by a preponderance of evidence) the legal standard that the complainant failed adequately to mitigate his or her loss of income by using reasonable diligence in seeking and keeping subsequent employment that was suitable and available and for which the complainant was qualified.

The Commission has indicated that it will evaluate any failure to mitigate claims raised by the respondent on a case-by-case basis. In numerous precedential decisions, the Commission has also given us the following information about how it will evaluate evidence under this mitigation legal standard:

"Failure to Use Reasonable Diligence in Seeking Employment" - The Commission will determine whether the complainant's mitigation efforts are "reasonable" under the circumstances of the individual case. The complainant need only seek substantially equivalent employment; that is, similar or comparable jobs. The complainant is not required to seek inferior employment (San Mateo County Sheriff's Office FEHC Dec. No. 82-16, p. 35). The fact that a particular industry is in decline does not require the complainant to look at other professions (American Airlines FEHC Dec. No. 83-15, p. 40).

Under certain circumstances, the complainant may take a lower paying job. This situation may exist where the complainant has a good faith belief that he or she has no choice but to take a lower paying job, because it would be futile to look for similar work (San Mateo County, pp. 36-37 and City of Sacramento, Personnel Department FEHC Dec. No. 83-20, pp. 8-9) or that there is future promise in the lower paying job (Carpenters Joint Apprenticeship and Training Committee Fund FEHC Dec. No. 83-19, [nonprec.] pp. 22-23). The Commission will also look at whether the complainant would be subjected to harassment, humiliation, or stress by seeking similar employment and will take into account the complainant's feelings under the circumstances (San Mateo County, p. 36). While the Commission expects the complainant to make some efforts to seek employment, it is the respondent's burden to show that there were comparable positions for which the complainant could have applied (American Airlines, p. 41).

"Failure to Use Reasonable Diligence in Keeping Employment" - The Commission has indicated that a complainant may leave a subsequent job for good cause. Among other things, harassment and humiliation resulting from the respondent's discrimination may be valid reasons for leaving a new job (C. E. Miller Corp. FEHC Dec. No. 84-02, pp. 36-38). If a complainant is legitimately fired from a subsequent job for misconduct, the Commission will consider this a failure to exercise reasonable diligence in keeping employment. However, it is the respondent's burden to show that the complainant was in fact fired for misconduct (Donald Schriver FEHC Dec. No. 84-07, p. 23). In general, if the respondent fails to present evidence as to why the complainant lost a job, the respondent will have failed to carry its burden, and the Commission will assume that the complainant left

the job for good cause (see Del Mar Avionics FEHC Dec. No. 85-19, pp. 26-27 and National Bindery FEHC Dec. No. 85-05 [nonprec.], p. 9).

"Failure to Remain in Labor Market" - The complainant is expected to remain available for work and not to remove himself from the labor market. Exceptions to this that are not a failure to mitigate are:

- The respondent's discrimination forces the complainant to change professions, and returning to school is the first step in reaching the goal of a new, but comparable, profession. In this situation, back pay liability will continue while the complainant is going to school (Louis Cairo FEHC Dec. No. 84-04, pp. 16-17).
- Complainant retires because it is futile to seek comparable employment (Carpenters Joint Apprenticeship, p. 23). In this case, the Commission awarded back pay to continue even after the complainant voluntarily retired.
- Complainant is mentally or physically unable to work because of humiliation, harassment, or stress resulting from the respondent's discrimination (Hart and Starkey FEHC Dec. No. 84-23, p. 32 and Kingsburg Cotton Oil Co., p. 36). In this type of case, the back pay liability will continue to accrue; however, any disability benefits that may be received during this time period will be deductible.

Describe the complainant's mitigation efforts here. Describe the complainant's efforts to seek work. List any jobs the complainant held, the dates he or she held them, and the salary the complainant earned. If the complainant was not available for employment during any part of the back pay period, is there a valid reason for the complainant not being available? For example, if the complainant returned to school, did the complainant do so because of the respondent's discrimination?

If it appears that the respondent may be able to prove that the complainant failed to mitigate his income loss in some part of the back pay period, note here which period of time might be affected and what the total monetary offset would be.

In summary, the amount of back pay claimed by the Department may be barred or reduced depending on whether the respondent can prove: 1) a wholly independent reason for the adverse action, 2) various offsets, 3) interruptions or an early end to the back pay period, or 4) a failure to mitigate. Some of these bars or limits are usually not disputed by the Department but are just accepted, such as actual interim earnings as an offset to

the back pay claim. Therefore, they should be included in the back pay calculation.

#### TOTAL BACK PAY CALCULATION

Back pay is calculated on a year-by-year basis starting on the date of the adverse action, the day the complainant begins to lose pay. Generally, to calculate the total amount of back pay to which the complainant is entitled, subtract from the complainant's expected earnings any undisputed offsets and add 10 percent interest per annum to the remaining total. (The Commission follows the California Code of Civil Procedure, Section 658.010, which allows ten percent interest per year to be added to a monetary judgment. The interest is to be compounded annually from the date of accrual to the date of payment.) Back pay should be calculated to the date of reinstatement or settlement or to the date the progress report is written.

#### Sample Back Pay Calculation

Complainant is terminated from her job on the morning of October 15, 1983. She files her DFEH complaint on September 4, 1984. The progress report is written on August 14, 1985. From October 15, 1983, complainant is unemployed but looking for work. Her wage rate with respondent would have been \$2,500 per month. On January 15, 1984, complainant gets a new job at \$2,000 per month. On May 15, 1984, complainant would have gotten a \$500 raise had she remained employed with respondent. On December 15, 1984, complainant gets a \$500 raise in her new job. On January 15, 1985, complainant becomes ill and goes on leave (unpaid). On March 15, 1985, complainant resumes her job. On June 15, 1985, complainant takes a job at a pay rate higher than her expected earnings from her original job with respondent.

#### Year One (October 15, 1983 to October 14, 1984)

October 15, 1983 to January 14, 1984 (Complainant unemployed but looking for work)

Expected earnings:		
\$2,500 mo. x 3 mos. =	\$ 7,500	
Offsets:	<u>0</u>	
	\$ 7,500	\$ 7,500

January 15, 1984 to May 14, 1984 (Complainant works at new job at less than expected earnings)

Expected earnings:		
\$2,500 mo. x 4 mos. =	\$10,000	
Offsets:		
\$2,000 mo. x 4 mos. =	<u>- 8,000</u>	
	\$ 2,000	\$ 2,000

May 15, 1984 to October 14, 1984 (Complainant would have  
received a raise from  
respondent)

Expected earnings:

\$3,000 mo. x 5 mos. = \$15,000

Offsets:

\$2,000 mo. x 5 mos. = -10,000

\$ 5,000

\$ 5,000

Total Wage Loss for October 14, 1983  
to October 14, 1984 (Year One):

\$14,500

Interest: \$14,500 x 10% = \$ 1,450

+ 1,450

Total Owed on October 14, 1984 (End of Year One):

\$15,950

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Year Two--Fraction (October 15, 1984 to August 14, 1985)

October 15, 1984 to December 14, 1984 (Complainant continues  
at same job)

Expected earnings:

\$3,000 mo. x 2 mos. = \$ 6,000

Offsets:

\$2,000 mo. x 2 mos. = - 4,000

\$ 2,000

\$ 2,000

December 15, 1984 to January 14, 1985 (Complainant gets raise  
in her new job)

Expected earnings:

\$3,000 mo. x 1 mos. = \$ 3,000

Offsets:

\$2,500 mo. x 1 mos. = - 2,500

\$ 500

\$ 500

January 15, 1985 to March 14, 1985 (Complainant on unpaid sick  
leave, clock stops)

March 15, 1985 to June 14, 1985 (Complainant resumes her job)

Expected earnings:

\$3,000 mo. x 3 mos. = \$ 9,000

Offsets:

\$2,500 mo. x 3 mos. = - 7,500

\$ 1,500

\$ 1,500

June 15, 1985 to August 14, 1985 (Complainant took job at pay  
rate greater than expected  
earnings. Back pay period  
ends on June 15, 1985, date  
complainant took higher  
paying job. However,  
interest is computed until  
date progress report is  
written, August 14, 1985.)

<u>Total Wage Loss for October 15, 1984 to June 15, 1985</u> (Fraction of Year Two):	\$ 4,000
<u>Total Owed at End of Year One (includes interest):</u>	<u>\$15,950</u>
<u>Total of Year One Plus Total Loss for Year Two:</u>	<u>\$19,950</u>
Interest: (10-15-84 to 8-14-85 = 10/12 months)	
Interest Rate: 10% x 10/12 mos. [.10 x .83] = 8.3% [.083]	
Interest Calculation: \$19,950 x 8.3% = \$1,655.85	<u>\$ 1,655.85</u>
<u>TOTAL BACK PAY AMOUNT</u> (owed on August 14, 1985)	<u>\$21,605.85</u>

For simplicity, this example uses whole months. In practice, your calculation may be based on fractional months. If so, take the number of days elapsed in the month in question over the total number of days in that month and multiply the wage rate by that fraction. Note also that although the clock may stop for back pay liability, because the complainant gets a higher paying job or for some other reason, interest will not stop but will continue to accrue until the date of calculation. (Theoretically, interest is calculated to the date on which the respondent complies with the Commission order. In practice, however, it may be computed to the date the progress report is written, to the date of settlement, or to the date of reinstatement.)

3. Is the complainant entitled to front pay?

Front pay is compensation for a pay loss that will occur in the period after the Commission's order goes into effect. The Department may obtain an order from the Commission for front pay if it can show generally that a pay loss will occur because of the respondent's unlawful discrimination. The respondent, in turn, may show that front pay is barred. (In the past, the Commission has used the term "front pay" to refer to what is really "post-hearing back pay" (see above). Currently, the Commission refers to the situations discussed below as warranting "front pay.")

a. Would the complainant lose pay while waiting to be put in his "rightful place"?

The Commission has indicated that it may award front pay in two types of situations. First, if the Commission has ordered reinstatement and positions or lines of progression are closed, front pay will be awarded to the complainant until such time as the complainant takes her rightful place or until such time as an offer of an appropriate position is made to the complainant (see Commission regulations, Section 7286.9(b)(1)). If this type of situation exists, in order to obtain front pay the Department will be expected to show that the complainant currently works for the respondent or will be reinstated to a position with the respondent, that the complainant deserves to be placed in another, higher paying position,

that the higher paying position will not be available for some period after the time the complainant deserves to be placed in it, and that the complainant, therefore, will lose pay while waiting to get into the higher position.

OR

Should compensation be ordered in lieu of hire or reinstatement because placement is not in the complainant's best interest in that working conditions would be too hostile?

A second type of situation where front pay may be awarded involves cases where the work environment has become so hostile or poisoned that reinstatement would not be in the complainant's best interest. Here the Commission may award a lump sum amount of front pay in lieu of reinstatement. (See Smitty's Coffee Shop FEHC Dec. No. 84-25, p. 18.) In order to obtain this type of front pay, the Department must claim that it would seek reinstatement were it not for the hostility. It must also show that the work atmosphere is poisoned enough that reinstatement is not possible and must identify how much the lump sum award should be. This amount will usually be the difference between what the complainant is presently earning and what the complainant would have earned had the complainant been employed or continued in the employ of the respondent. Front pay may continue until the complainant is making as much in his present job as the complainant would have been making with the respondent or may be awarded for only a fixed period of time. Courts have awarded front pay for as long as five years or more from the date of the court judgment. The proper amount of front pay should attempt to restore the complainant to the economic position he would have been in had the discrimination not occurred.

b. Is there a bar to front pay?

If reinstatement is barred because the respondent can prove a wholly independent reason for the adverse action or an inability to reinstate (see discussion under questions A.1.b.1) and 2), above), front pay is also barred. If there is the possibility that this situation exists, note that here. Do not repeat evidence already discussed above.

4. To what compensation for benefit losses is the complainant entitled?

a. What loss was caused by a denial of benefits resulting from the respondent's unlawful conduct?

The Commission has the authority to award compensation where the complainant suffered monetary losses as a result of not having a particular employment benefit the complainant would have had absent the respondent's unlawful discrimination. For example, a complainant has medical insurance as a benefit of employment with the

respondent and loses this benefit after he is terminated. Later the complainant has to have an operation and incurs medical expenses. If the Commission finds that the complainant's termination was discriminatory, the respondent may be liable for making the complainant whole by compensating him for these medical expenses plus interest. See City of Napa, Housing Authority FEHC Dec. No. 81-12, pp. 10, 29; Sterling Transit FEHC Dec. No. 79-04, p. 9. (Note that the type of loss discussed here does not involve cashing in on the cost of benefits themselves.)

If the complainant has suffered this type of benefit loss, in order to obtain compensation, the Department must show the amount of the loss and that the complainant would, in fact, have received the benefit in question and therefore would not have incurred the loss, absent discrimination.

b. Are there bars or limits to compensation for benefit losses?

1) Would the respondent's wholly independent reason for the adverse action bar compensation for benefit losses?

If placement is barred because the respondent can prove by clear and convincing evidence that it certainly would have taken the adverse action against the complainant for wholly independent reasons, even absent discrimination (see discussion of wholly independent reasons under question A.1.b.1), above), compensation for benefit losses will also be barred. If this situation possibly exists, note that here. Do not repeat evidence already discussed above.

2) Would other circumstances bar or limit compensation for benefit losses?

The respondent may be able to show that other circumstances would have deprived the complainant of the benefit in question and that the complainant, absent discrimination, would have suffered the loss anyway. For example, if the complainant's job ceased to exist or he or she would have been laid off anyway later, the complainant may not have had the benefit in question at the time the loss occurred. (See discussion under questions A.1.b.2) and A.2.b.3), above.)

5. To what compensation for loss of experience is the complainant entitled?

In certain types of cases in which a complainant intends to continue in the type of work in question or in a related profession, the respondent's discrimination may have caused the irreparable injury of loss of experience and/or the opportunity to learn which cannot be compensated by placement, back pay, or front pay. If such circumstances exist, the

Commission will award additional monetary compensation plus interest in order to make the complainant whole.

- a. Did the complainant lose work experience as a result of the respondent's unlawful discrimination, and how valuable was that experience?

In order to obtain compensation for loss of experience, the Department must show that the complainant is continuing in the same type of work or in a similar profession, that the respondent's unlawful conduct caused the complainant to lose actual, practical work experience, that experience matters in this profession, and that complainant cannot regain such experience even if given the job in question in the future. The Department must also show the value of the experience to the complainant.

No guidelines exist for how much the award should be. The Commission, however, appears to have ordered the nominal amount of \$2,500 per year for each year of lost experience. Do not recommend an amount in a progress report. Simply report the evidence, if any, that may support an award for loss of experience.

The following examples illustrate the types of cases in which the Commission has ordered compensation for loss of experience:

Example 1:

In American Airlines FEHC Dec. No. 83-15, the Commission found that Respondent denied Complainant a position as a Fleet Service Clerk in its Air Freight Unit in 1978 because of her sex. In addition to the usual relief to the Complainant, the Commission also awarded Complainant \$2,500 plus interest per year for lost experience and the opportunity to learn from 1978 until the date the Complainant was reinstated by Respondent. The Commission stated that this nominal amount was to compensate the Complainant for loss of experience, the loss of career building contacts, and the disrupted employment history she suffered as a result of Respondent's conduct. Complainant had wanted a career in the warehousing industry outside the airlines. She would have gained the necessary experience to enter this otherwise closed field by working for Respondent. Respondent's conduct had left Complainant five years behind in attaining her preliminary goal and had also delayed her advancement in the airline industry.

Example 2:

In City of San Jose (Jimenez) FEHC Dec. No. 84-18, the Commission found that Respondent rejected Complainant for a firefighter position because of his physical handicap (spondylolysis). In addition to the usual relief to the Complainant, the Commission awarded

\$2,500 plus interest per year for lost experience from the date the Complainant would have begun employment (May 1981) until the date Respondent actually hired him. The Commission stated that because advancement as a firefighter depended heavily on actual training and experience in the lower ranks, Complainant would be inevitably and permanently retarded in his firefighting career, even after he was actually hired, simply because he was not in fact working as a firefighter somewhere else. This loss could not be compensated merely by ordering Complainant to be hired and given retroactive seniority. The Commission therefore awarded this additional compensation.

Example 3:

In Long Beach Unified School District (Dean) FEHC Dec. No. 84-29 (nonprec.), the Commission found that Complainant had been denied a temporary one-year teaching contract because of his physical handicap (obesity, high blood pressure, and heart condition). The Commission found that because Complainant did not actually work as a full-time temporary contract teacher during the 1980-81 school year, Complainant also irretrievably lost the value to his own development of the practical hands-on experience that such work would have given him at a formative stage of his teaching career. Also, when he applied to other school districts, his teaching experience would be one year less than if Respondent had not rejected him. The Commission found that this loss of experience was thus a genuine detriment to Complainant that would not be corrected by other relief already ordered. The Commission therefore ordered Respondent to pay Complainant \$2,500 plus interest to make Complainant whole for this loss.

b. Are there bars or limits to compensation for loss of experience?

1) Would the respondent's wholly independent reason for the adverse action bar compensation for loss of experience?

If placement is barred because the respondent can prove by clear and convincing evidence that it certainly would have taken the adverse action against the complainant for wholly independent reasons, even absent discrimination (see discussion of wholly independent reason under question A.1.b.1), above), compensation for loss of experience will also be barred. If there is the possibility that this situation exists, note that here. Do not repeat evidence already discussed above.

2) Would other circumstances bar or limit compensation for loss of experience?

The respondent may also be able to show that other circumstances would have deprived the complainant of the job in question, absent discrimination, and that the complainant, therefore, would have lost the experience anyway or would have had less experience. For example, the complainant might have gained no experience or less experience if his job had ceased to exist or the complainant would have been laid off anyway. (See discussion under questions A.1.b.2) and A.2.b.3), above.)

6. To what compensation for other monetary losses is the complainant entitled?

a. What other monetary loss was caused by the respondent's unlawful actions?

If the complainant has suffered other losses because of the respondent's unlawful actions, in order to make the complainant whole, the Commission will order monetary compensation plus interest for these losses in addition to the usual remedies already ordered. In order to obtain this type of compensation for the complainant, the Department must show the nature and the amount of the loss and that it did, in fact, occur as a result of the respondent's discrimination.

In its decisions, the Commission has either awarded, or considered evidence as to whether it would award, compensation for the following types of losses or expenses:

- Expenses for challenging discrimination:

- O Air fare, lodging, car rental, gas, parking to prepare for DFEH hearing or to attend hearing (Peralta College FEHC Dec. No. 83-05 [nonprec.], p. 11).
- O Expenses to produce medical evidence to reverse respondent's discriminatory refusal to hire (City of San Jose [Jimenez] FEHC Dec. No. 84-18, p. 24).
- O Telephone expenses to obtain advice on rights and assistance in pressing claims (Louis Cairo FEHC Dec. No. 84-04, p. 9, 19).
- O Legal expenses, out-of-pocket attorney's fees for necessary and supplemental work by independent counsel where attorney's services are not duplicative of those provided by Department counsel (American Airlines FEHC Dec. No. 83-15, pp. 56-68 and Louis Cairo, pp. 21-29).

- Expenses to obtain alternative employment or income:
  - O Telephone expenses to seek new employment (Louis Cairo, p. 9).
  - O Telephone expenses to secure numerous government benefits (Louis Cairo, p. 9).
  - O Employment agency fees (Clean Steel, Inc. FEHC Dec. No. 85-13 [nonprec.], p. 10).
  - O Moving and storage expenses (C. E. Miller FEHC Dec. No. 84-02, p. 39).
  - O Gasoline expenses for searching for a permanent job (Rings Restaurant [Moore] FEHC Dec. No. 85-17 [nonprec.], p. 19).
- Loss of benefits from source other than respondent:
  - O Reimbursement for lost Veterans' Administration education benefits which complainant would have received had he been hired by respondent (City and County of San Francisco [Herrera] FEHC Dec. No. 84-28 [nonprec.], pp. 33-34).
- Medical expenses for emotional injury:
  - O Reimbursement for medical expenses for physical and psychological injury resulting from respondent's unlawful race discrimination (Duty Free Shoppers LAX, Inc. FEHC Dec. No. 85-15 [nonprec.], p. 17).

Remember that the Commission will order compensation for all losses that result from the respondent's discrimination once they have been identified by the Department, not just for the losses listed in the above examples. Be sure to examine very carefully what happened to the complainant from the time of the adverse action in order to determine whether there are any other compensable losses.

b. Are there bars or limits to compensation for other monetary losses?

The respondent may be able to show bars or limits to some of these types of remedies. If placement is barred because the respondent may be able, for example, to prove one of the wholly independent reasons discussed under question A.1.b.1), above, or an inability to reinstate, compensation for expenses incurred to seek alternative employment may also be barred. This is so because if the respondent would have terminated or not hired the complainant anyway, any expenses incurred to seek alternative employment would have occurred anyway despite the discrimination. On the other hand, expenses for challenging discrimination will not be barred or limited.

B. What affirmative or general relief is required?

In addition to the remedies already discussed in this subchapter, under Section 12970(a) of the FEHA, the Commission also has the authority to order affirmative or general relief to stop the respondent from continuing to commit unlawful employment practices or to require the respondent to take action to prevent future discrimination. For example, the Commission may order the respondent to cease and desist from a specific employment practice, such as categorically rejecting all applicants for firefighter positions who have the spondylolysis back condition; or it may order the respondent to take specific affirmative action, such as developing a written sexual harassment policy and training all managers.

Affirmative or general relief is called such because it benefits others besides the complainant and because it is designed to have a future deterring effect. The Commission will order this type of relief only where the Department has established that the facts in the complainant's individual case show that the general, unlawful practice in question is indefensible or where the facts show that additional remedies are required to prevent future discrimination.

Affirmative or general relief may include, but is not limited to:

- cease and desist orders to correct specific discriminatory policies or practices (e.g., illegal categorical hiring exclusions, failure to allow an independent medical opinion, illegal verbal and written inquiries, failure to retain records, discriminatory selection procedures, discriminatory wage classification criteria, etc.),
- orders to develop specific nondiscriminatory policies (e.g., anti-racial discrimination or sexual harassment policies and complaint procedures),
- orders to develop nondiscrimination training programs,
- orders for affirmative recruiting, hiring, and promotion of women or specific minority groups with reporting requirements, and
- posting orders (notices to be posted at the respondent's place of business notifying employees that the Commission found the respondent guilty of discrimination and notifying them of their right to file a complaint and the procedures for doing so).

Remember that the above examples represent only some of the types of general relief that may be appropriate. Since the Commission is mandated by the law to fashion the most complete remedy possible, it will order all types of affirmative relief that will further the purposes of the FEHA.

For examples of affirmative or general relief with sample language that may be used in settlement agreements, see Appendix B in this subchapter.

C. The Law: Sources of the Legal Standards for Remedy (Issue IV)

1. Statutes and Regulations

FEHA (Government Code) Sections 12963.7, 12964, 12970 (a)-(f), 12973, 12974, 12975, 12976.

Commission Regulations Section 7286.9.

2. Commission Precedential Decisions

- Placement

DFEH v. City of Simi Valley (Goehring) FEHC Dec. No. 83-21, pp. 14-16 [reversed and reissued as nonprecedential FEHC Dec. No. 88-06]. Hire; still a good example of wholly independent reason - incomplete selection process.

DFEH v. C. E. Miller Corp. (McBride) FEHC Dec. No. 84-02, pp. 35-36. Reinstatement; respondent's inability to reinstate - laid off anyway.

DFEH v. Louis Cairo (Bryant) FEHC Dec. No. 84-04, pp. 15-16. Reinstatement; wholly independent reason - multiple causal factors.

DFEH v. City of San Jose (Jimenez) FEHC Dec. No. 84-18, pp. 22-23. Hire; wholly independent reason - incomplete selection process.

DFEH v. Smitty's Coffee Shop (Hunt) FEHC Dec. No. 84-25, pp. 16-17. Reinstatement; wholly independent reason - multiple causal factors.

DFEH v. Kingsburg Cotton Oil Co. (Austin) FEHC Dec. No. 84-30, pp. 32-35. Reinstatement; respondent's inability to reinstate - job ceased to exist.

DFEH v. Centennial Bank (Levine) FEHC Dec. No. 87-03, p. 19. Reinstatement; wholly independent reason - violation of bank rules.

DFEH v. Church's Fried Chicken (Jackson) FEHC Dec. No. 90-11; reissue of 87-18, pp. 25-27. Reinstatement; wholly independent reason - performance deficiencies.

- Back Pay

DFEH v. City of Napa, Housing Authority (Sebia) FEHC Dec. No. 81-12, p. 28. Three-year limitation on back pay.

DFEH v. Ambylou Enterprises, Inc. (Wilson) FEHC Dec. No. 82-06, pp. 8-9. Respondent's burden to show failure to mitigate.

DFEH v. San Mateo County Sheriff's Office (Donovan) FEHC Dec. No. 82-16, pp. 34-39. Mitigation - reasonable efforts to seek comparable employment, entering school.

DFEH v. San Francisco Municipal Railway (Eskridge) FEHC Dec. No. 82-23, p. 14. Unemployment insurance not deductible.

DFEH v. City and County of San Francisco, and San Francisco Municipal Railway (Jones) FEHC Dec. No. 82-25, pp. 9-10. Disability benefits may be deductible.

DFEH v. American Airlines (Sarembe) FEHC Dec. No. 83-15, pp. 37-52. Mitigation - seek comparable work; back pay period; welfare payments not deductible.

DFEH v. City of Sacramento (Mallory) FEHC Dec. No. 83-20, pp. 8-9. Mitigation - diligence in seeking comparable work, futility of seeking similar work.

DFEH v. C. E. Miller (McBride) FEHC Dec. No. 84-02, pp. 36-39. Mitigation - leaving new employment.

DFEH v. Louis Cairo (Bryant) FEHC Dec. No. 84-04, pp. 16-19. Mitigation - entering school to seek new, but comparable career; part of school grant may be deductible; disability benefits not deductible if back pay period stopped.

DFEH v. Hart and Starkey, Inc., dba Shakey's Pizza Parlor (Perez et al.) FEHC Dec. No. 84-23, pp. 31-33. Mitigation - not a failure to mitigate if a result of mental stress from discrimination.

DFEH v. Kingsburg Cotton Oil Co. (Austin) FEHC Dec. No. 84-30, pp. 35-57. Mitigation - mental stress from discrimination causes inability to seek work, back pay period continues; disability benefits may be deductible, unemployment insurance not deductible.

DFEH v. Del Mar Avionics and Coy Wall, Its Supervisor and Agent (Thompkins) FEHC Dec. No. 85-19, pp. 26-27. Mitigation - Respondent failed to show that back pay liability ended when Complainant voluntarily resigned from position acquired after Respondent's constructive discharge. Respondent's burden was to demonstrate Complainant resigned without good cause.

DFEH v. Centennial Bank (Levine) FEHC Dec. No. 87-03, pp. 16-18. Mitigation - Respondent's burden to show failure to mitigate; Respondent's burden to show wholly independent reason by clear and convincing evidence.

DFEH v. Raytheon Co. (Estate of Chadbourne) FEHC Dec. No. 89-09, p. 20; re-issue of FEHC Dec. No. 87-12 (July 6, 1989). Back pay limited to period of time in which the Complainant was physically able to work.

DFEH v. Aluminum Precision Products, Inc. (Wingard) FEHC Dec. No. 88-05, pp. 9-10. Mitigation - acceptance of lower-paying comparable job does not undermine adequacy of mitigation.

DFEH v. California State University - Sacramento (Hyde) FEHC Dec. No. 88-08, pp. 10-16. Workers' Compensation Act (WCA) does not bar recovery of remedies under the FEHA.

DFEH v. Madera County; Madera County Civil Service Commission; Madera County Assessor Richard Gordon; and Lawrence (Jerry) Marsh (Hauksdottir, Complainant-Intervenor), FEHC Dec. No. 90-03, pp. 36-37. FEHC awarded \$150,000 in compensatory damages. Back pay offset by disability payments.

DFEH v. Robert Daniel Peverly, aka Robert John Puff, individually and dba Music City (La Plante, a minor; La Plante, Guardian Ad Litem; Thomas, a minor; Holt, Guardian Ad Litem). FEHC Dec. No. 91-05. FEHC excused the complainants' obligation to mitigate immediately after being constructively discharged because of the sexual harassment they suffered, their young age (fourteen years old), and their status as full-time students in the ninth grade.

- Front Pay

DFEH v. Smitty's Coffee Shop (Hunt) FEHC Dec. No. 84-25, p. 18. Front pay in lieu of reinstatement.

DFEH v. Centennial Bank (Levine) FEHC Dec. No. 87-03, pp. 18-19. Front pay in lieu of reinstatement; establishing poisoned work environment.

DFEH v. Madera County; Madera County Civil Service Commission; Madera County Assessor Richard Gordon; and Lawrence (Jerry) Marsh (Hauksdottir) FEHC Dec. No. 90-03, pp. 37-38. Front pay inappropriate because Complainant obtained higher paying job.

- Benefit Losses

DFEP v. Sterling Transit (Bustamante) FEHC Dec. No. 79-04, p. 9. Medical expenses.

DFEH v. City of Napa, Housing Authority (Sebia) FEHC Dec. No. 81-12, pp. 10, 29. Medical and dental expenses that would have been covered by respondent's insurance plan.

DFEH v. California State University - Sacramento (Hyde) FEHC Dec. No. 88-08, pp. 25-26. Medical expenses that would have been covered by Respondent's insurance plan. Restoration of retirement contributions, vacation and personal holiday hours.

DFEH v. Madera County; Madera County Civil Service Commission; Madera County Assessor Richard Gordon; and Lawrence (Jerry) Marsh (Hauksdottir) FEHC Dec. No. 90-03, p. 37. Contributions to Complainant's retirement and social security accounts as if Complainant had been employed from date of disability leave to date of hearing.

- Loss of Experience

DFEH v. American Airlines (Sarembe) FEHC Dec. No. 83-15, pp. 53-54.

DFEH v. City of San Jose (Jimenez) FEHC Dec. No. 84-18, p.25.

- Other Monetary Losses

DFEH v. American Airlines (Sarembe) FEHC Dec. No. 83-15, pp. 56-68. Attorney's fees for necessary supplemental work.

DFEH v. C. E. Miller Corp. (McBride) FEHC Dec. No. 84-02, p. 39. Moving and storage expenses.

DFEH v. Louis Cairo (Bryant) FEHC Dec. No. 84-04, p. 9. Telephone expenses to seek legal advice, new employment, and benefits; attorney's fees for necessary supplemental work.

DFEH v. City of San Jose (Jimenez) FEHC Dec. No. 84-18, p. 24. Expenses to produce medical evidence.

DFEH v. Raytheon Co. (Estate of Chadbourne) FEHC Dec. No. 89-02, pp. 25-29; reissued of FEHC Dec. No. 87-34 (July 6, 1989). Attorney fees for significant, independent, and "not unnecessarily duplicative" work.

DFEH v. Aluminum Precision Products, Inc. (Wingard) FEHC Dec. No. 88-05, p. 10. Expenses to produce medical evidence - amount must be proven.

DFEH v. Madera County; Madera County Civil Service Commission; Madera County Assessor Richard Gordon; and Lawrence (Jerry) Marsh (Hauksdottir) FEHC Dec. No. 90-03 pp. 38-39. Lost earnings from supplemental career; out-of-pocket medical expenses.

DFEH v. The Customer Company, dba Zia's Food and Liquor, and Zia Karimyar, individually and as Managing Agent (Bolger). FEHC Dec. No. 91-03 (non-precedential). FEHC awarded complainant and her husband travel costs of attending the administrative hearing (round-trip plane tickets from Ohio to San Jose, rental car, motel costs, plus interest).

DFEH v. Robert Daniel Peverly, aka Robert John Puff, individually and dba Music City (La Plante, a minor; La Plante, Guardian Ad Litem; Thomas, a minor; Holt, Guardian Ad Litem). FEHC Dec. No. 91-05. FEHC awarded complainants income lost while they attended hearing.

- Compensatory Damages--Emotional Injury - The California Supreme Court's December 20, 1990 ruling in Peralta Community College District v. Fair Employment and Housing Commission ((1990) 52 Cal.3d. 40) eliminated the FEHC's authority to award compensatory damages in employment discrimination cases. The decisions containing compensatory damages were:

DFEH v. Ambylou Enterprises, Inc. (Wilson) FEHC Dec. No. 82-06, pp. 9-13.

DFEH v. San Mateo County Sheriff's Office (Donovan) FEHC Dec. No. 82-16, pp. 39-40.

Fresno Hilton Hotel (Burns) FEHC Dec. No. 84-03, pp. 34-36.

DFEH v. San Francisco Municipal Railway (Eskridge) FEHC Dec. No. 82-23, pp. 14-16.

DFEH v. Louis Cairo (Bryant) FEHC Dec. No. 84-04, p. 19.

DFEH v. Donald Schriver, Inc. (Ehlers) FEHC Dec. No. 84-07, pp. 17-18. Compensatory damages eliminated pursuant to FEHC "Order Modifying Decision Upon Remand", FEHC Dec. No. 91-11.

DFEH v. Jack's Restaurant (Johnson) FEHC Dec. No. 84-08, pp. 12-13; re-issued as non-precedential FEHC Dec. No. 89-13 (September 4, 1989).

DFEH v. Bee Hive Answering Service (Dowing) FEHC Dec. No. 84-16. pp. 25-26.

Hart and Starkey, Inc., dba Shakey's Pizza Parlor (Perez, et al.) FEHC Dec. No. 84-23, pp. 33-36.

DFEH v. Smitty's Coffee Shop (Hunt) FEHC Dec. No. 84-25, p. 19.

DFEH v. Kingsburg Cotton Oil Co. (Austin) FEHC Dec. No. 84-30, pp. 37-39.

DFEH v. La Victoria Tortilleria, Inc., La Victoria Tortilleria, and Jean Mora (Carrillo) FEHC Dec. No. 85-04, p. 20 (all three Respondents jointly and severally liable for half of damages; harasser solely liable for the remaining half.)

DFEH v. Del Mar Avionics and Coy Wall, Its Supervisor and Agent (Thompkins) FEHC Dec. No. 85-19, pp. 27-28.

DFEH v. Community Hospital of San Gabriel (Quan) FEHC Dec. No. 86-08, pp. 11-12.

DFEH v. American Medical International, Inc., dba AMI; Medical Center of Garden Grove and Circle City Hospital (Willis) FEHC Dec. No. 86-13, p. 16. Compensatory damages eliminated pursuant to "Order Modifying Decision Upon Remand", FEHC Dec. No. 91-12.

DFEH v. Davis Realty, Inc. - Marin and Sonoma (Porter, Snider, Porter, and Kirtley) FEHC Dec. No. 87-02, pp. 23-26.

DFEH v. Centennial Bank (Levine) FEHC Dec. No. 87-03, pp. 19-20.

DFEH v. Raytheon Co. (Estate of Chadbourne) FEHC Dec. No. 89-09, pp. 20-22; reissued of FEHC Dec. No. 87-12 (July 6, 1989). Commission may award compensatory damages to estate of deceased Complainant.

DFEH v. Church's Fried Chicken (Jackson) FEHC Dec. No. 90-11, pp. 27-28; reissue of FEHC Dec. No. 87-18. 1990 decision eliminated compensatory damages.

DFEH v. Aluminum Precision Products, Inc. (Wingard) FEHC Dec. No. 88-05, pp. 10-14. Award of nominal compensatory damages (\$250) for emotional injury; criteria for determining extent of emotional injury.

DFEH v. California State University - Sacramento (Hyde) FEHC Dec. No. 88-08, pp. 26-28.

DFEH v. Madera County; Madera County Civil Service Commission; Madera County Assessor Richard Gordon; and Lawrence (Jerry) Marsh (Hauksdottir) FEHC Dec. No. 90-03, pp. 34-36. Award of \$150,000 in compensatory damages.

DFEH v. Huncot Properties and Charles Thomas (Harley) FEHC Dec. No. 88-21, pp. 14-16. Compensatory damages set aside pursuant to "Order Modifying Decision Upon Remand", FEHC Dec. No. 91-10.

DFEH v. J. E. Robinson, D.D.S. (Saul) FEHC Dec. No. 89-02, pp. 16-17.

DFEH v. Gill, Blankenbaker and Lawson, A Professional Partnership; and Richard Tuckley, A Partner and an Individual (Okamoto) FEHC Dec. No. 89-15, pp. 19-21. Compensatory damages set aside pursuant to "Order Modifying Decision Upon Remand" FEHC Dec. No. 91-16.

DFEH v. Dimino & Card (Green) FEHC Dec. No. 90-05, pp. 19-21.

DFEH v. Right Way Homes, Inc. aka Homefinders, Jerry Wilkerson As an Individual and Managing Agent (McKinney and Martin) FEHC Dec. No. 90-16, pp. 16-18.

DFEH v. Barbara Rosenberg, individually and dba TMC Motorsports; Tim Martin, As an Employer and an Individual (Hageman Opp) FEHC Dec. No. 90-09, pp. 11-12.

- Punitive Damages - The California Supreme Court's ruling on FEHC Dec. No. 82-14, DFEH v. Dyna-Med, eliminated the Commission's authority to award punitive damages in employment cases. The decisions containing punitive damages awards were:

DFEH v. Ambylou Enterprises, Inc. (Wilson) FEHC Dec. No. 82-06, pp. 13-19.

DFEH v. Dyna-Med, Inc. (Olander) FEHC Dec. No. 82-14, pp. 18-27. Revised and reissued as FEHC Dec. No. 88-03, pp. 18-27.

DFEH v. Fresno Hilton Hotel (Burns) FEHC Dec. No. 84-01, pp. 36-41.

DFEH v. Donald Schriver, Inc. (Ehlers) FEHC Dec. No. 84-07, pp. 18-22. Punitive damages set aside pursuant to "Order Modifying Decision Upon Remand", FEHC Dec. No. 91-11.

DFEH v. Jack's Restaurant (Johnson), FEHC Dec. No. 84-08, pp. 13-14.

DFEH v. Bee Hive Answering Service (Dowing) FEHC Dec. No. 84-16, pp. 26-28.

DFEH v. Hart and Starkey, Inc., dba Shakey's Pizza Parlor (Perez et al.) FEHC Dec. No. 84-23, pp. 36-40.

DFEH v. La Victoria Tortilleria (Carrillo) FEHC Dec. No. 85-04, pp. 20-22.

DFEH v. Del Mar Avionics (Thompkins) FEHC Dec. No. 85-19, pp. 28-33.

DFEH v. La Victoria Tortilleria, Inc., La Victoria Tortilleria, and Juan Mora (Carrillo) FEHC Dec. No. 85-04, pp. 20-21.

DFEH v. Del Mar Avionics and Coy Wall, Its Supervisor and Agent (Thompkins) FEHC Dec. No. 85-19, pp. 28-33.

DFEH v. American Medical International, Inc. dba AMI; Medical Center of Garden Grove and Circle City Hospital (Willis) FEHC Dec. No. 86-13, pp. 16-18. Punitive damages set aside pursuant to "Order Modifying Decision Upon Remand", FEHC Dec. No. 91-12.

DFEH v. Church's Fried Chicken (Jackson) FEHC Dec. No. 90-11, reissue of 87-18, pp. 28-32.

- Affirmative or General Relief

DFEH v. Northrup Services (Hand) FEHC Dec. No. 83-11, p. 17. Posting order.

DFEH v. City of San Jose (Jimenez) FEHC Dec. No. 84-18, p. 25. Discontinue practice of no-spondylolysis BFOQ to all applicants.

DFEH v. La Victoria Tortilleria (Carrillo) FEHC Dec. No. 85-04, pp. 22-24. Posting orders, development and posting of written sexual harassment policy, training by DFEH of respondent's employees and managers.

DFEH v. Del Mar Avionics and Coy Wall, Its Supervisor and Agent (Thompkins) FEHC Dec. No. 85-19, pp. 35-36. Development, implementation, posting of harassment policy; training sessions conducted by DFEH.

DFEH v. Raytheon Co. (Estate of Chadbourne) FEHC Dec. No. 87-12, p. 24; re-issued as FEHC Dec. No. 89-09 (July 6, 1989). Employee training sessions on the nature of AIDS, manner in which it can be transmitted, and civil rights of employees with AIDS.

DFEH v. Bohemian Club (Lewis) FEHC Dec. No. 88-01, pp. 74-75. Affirmative action program for recruitment and hiring of women.

DFEH v. Huncot Properties and Charles Thomas (Harley) FEHC Dec. No. 88-21, p. 18. Department ordered to seek complainant's permission to refer FEHC decision to local district attorney for filing of criminal charges for sexual battery Penal Code violation.

DFEH v. Madera County; Madera County Civil Service Commission; Madera County Assessor Richard Gordon; and Lawrence (Jerry) Marsh (Hauksdottir) FEHC Dec. No. 90-03, pp. 39-40. Development, implementation, posting of anti-harassment policy; training session with form and content approved by DFEH.

DFEH v. J. E. Robinson, D.D.S. (Saul) FEHC Dec. No. 89-02, pp. 17-19. Implementation of a pregnancy disability leave policy necessary to meet affirmative duty under Government Code Section 12940(i) to take all reasonable steps to keep discrimination from occurring.

DFEH v. Guill, Blankenbaker and Lawson, A Professional Partnership; and Richard Tuckley, A Partner and an Individual (Okamoto) FEHC Dec. No. 91-16. Re-issue of FEHC Dec. No. 89-15, pp. 22-23. Example of inadequate sexual harassment policy. Development, implementation and posting of new policy; training sessions with form and content approved by DFEH.

DFEH v. Dimino & Card (Green) FEHC Dec. No. 90-05, pp. 22-24. Development and implementation of pregnancy disability leave policy to be approved by DFEH; training sessions with form and content approved by DFEH.

DFEH v. Right Way Homes, Inc. aka Homefinders; Jerry Wilkerson, As an Individual and Managing Agent (McKinney and Martin) FEHC Dec. No. 90-16, pp. 18-20. Development, implementation, posting of anti-discrimination policy; training sessions with form and content to be approved by DFEH. Notice of FEHC decision to Respondent's California licensing agency; monitoring of workplace and any business harasser owns for three years.

DFEH v. Robert Daniel Peverly, aka Robert John Puff, individually and dba Music City (La Plante, a minor; La Plante, Guardian Ad Litem; Thomas, a minor; Holt, Guardian Ad Litem). FEHC Dec. No. 91-05. Respondent found in violation of Government Code Sections 12940(h) and (i). FEHC ordered implementation of an anti-harassment policy, posting, and a training program.

### 3. Court Decisions on Commission Cases

Victor Hess v. Fair Employment and Housing Commission (1982) 138 Cal. App. 3d 232. Confirms the Fair Employment and Housing Commission's authority to award compensatory damages for emotional injury in housing cases. But see Walnut Creek Manor v. Fair Employment and Housing Commission, (1991) 54 Cal. 3d 245, below.

County of Alameda v. FEHC (1984) 153 Cal. App. 3d 499, 508-9.  
Unemployment insurance not deductible from back pay award; inclusion of fringe benefits in back pay.

Bohemian Club v. Fair Employment and Housing Commission (1986) 187 Cal. App. 3d 1. California Supreme Court denied review; appeal dismissed.

Dyna-Med, Inc. v. Fair Employment and Housing Commission (1987) 43 Cal.3d 1379. Eliminated the Commission's authority to award punitive damages in employment cases.

Fair Employment and Housing Commission v. Jack's Restaurant and Jack Schat, Owner. California Court of Appeals found no authority for compensatory and punitive damages and California Supreme Court denied hearing [unpublished decision, 1989].

Church's Fried Chicken v. Fair Employment and Housing Commission. Unpublished decision of California Court of Appeals (1990). Eliminated compensatory damages award.

J. E. Robinson v. Fair Employment and Housing Commission (November 30, 1990). Cal. App. 4th Dist. Affirmed FEHC's position that, for jurisdictional purposes, part-time employees are counted in assessing whether an employer has five or more employees.

Peralta Community College District v. Fair Employment and Housing Commission, California Supreme Court (1990) 52 Cal.3d. 40. Held that Government Code Section 12970(a) did not authorize the FEHC to award compensatory damages in employment discrimination cases. (Note: Peralta was a non-precedential Commission case.)

Donald Schriver, Inc. v. Fair Employment and Housing Commission (4/26/91). Los Angeles County Superior Court granted the respondent's writ of mandate setting aside the compensatory and punitive damage award contained in FEHC Dec. No. 84-07. FEHC issued Order Modifying Decision Upon Remand (FEHC Dec. No 91-11, 5/28/91).

Huncot Properties and Charles Thomas v. Fair Employment and Housing Commission (2/14/91). Los Angeles County Superior Court remanded case to FEHC to set aside the compensatory damage award contained in FEHC Dec. No. 88-21. FEHC issued Order Modifying Decision Upon Remand (FEHC Dec. No. 91-10, 5/23/91).

American Medical International, Inc. dba AMI; Medical Center of Garden Grove and Circle City Hospital v. Fair Employment and Housing Commission (2/27/91). Court of Appeal, 4th District, set aside the compensatory and punitive damage award contained in FEHC Dec. No. 86-13. FEHC issued Order Modifying Decision Upon Remand (FEHC Dec. No. 91-12, 6/28/91).

Guill, Blankenbaker and Lawson, A Professional Partnership; and Richard Tuckley, A Partner and an Individual v. Fair Employment and Housing Commission. Los Angeles Superior set aside the compensatory damage award contained in FEHC Dec. No. 89-15 (10/27/89). FEHC issued FEHC Dec. No. 91-16, Order Modifying Decision Upon Remand" (8/1/91).

Walnut Creek Manor et al. v. Fair Employment and Housing Commission (1991) 54 Cal.3d 245. Although Government Code Section 12987 authorizes the FEHC to award compensatory damages, an administrative award of unlimited general compensatory damages violates the judicial powers clause of the California Constitution. Government Code Section 12987 authorizes only one punitive damage award against a respondent for a course of conduct against the same individual on the same unlawful basis. FEHC's award of out-of-pocket expenditures for increased rent and utilities resulting from a discriminatory rent denial does not violate the judicial powers clause of the California Constitution.

4. Non-Commission Related Court Cases

Commodore Homes Systems, Inc. v. Superior Court (1982) 32 Cal.3d 211. All relief generally available in noncontractual actions, including punitive damages, may be obtained in a civil action under the FEHA.

5. Commission Decisions on Appeal

Madera County v. Fair Employment and Housing Commission; writ at Superior Court.

APPENDIX A

AMOUNTS OF COMPENSATORY AND PUNITIVE DAMAGES AWARDED IN COMMISSION DECISIONS

\*Precedential

DECISION	NO.	DATE	BASIS AND TYPE OF ADVERSE ACTION	COMPENSATORY DAMAGES	PUNITIVE DAMAGES
Ambylou (Wilson)*	82-06	01/07/82	Sexual harassment--work-environment, termination	\$15,000	\$25,000
Dyna-Med, Inc.*	82-14	11/01/82	Retaliation--termination for filing DFEH complaint	---	\$ 7,500
San Mateo County, San Mateo County Sheriff's Office*	82-16	11/04/82	Sex (female)--termination	\$ 5,000	---
Computerland, El Toro	82-17	11/04/82	Sexual harassment--work-environment, constructive discharge	\$ 2,000	\$ 5,000
Circle K	82-18	11/04/82	Physical handicap (laryngectomy)-- failure to hire	\$ 3,000	---
San Francisco Municipal Railway*	82-23	11/02/82	Race (Black)--termination	\$ 7,500	---
Mission Packing Co.	83-01	01/06/83	Religion (Seventh Day Adventist)-- failure to accommodate Sabbath (termination)	\$ 3,000	---

AMOUNTS OF COMPENSATORY AND PUNITIVE DAMAGES (CONTINUED)

\*Precedential

DECISION	NO.	DATE	BASIS AND TYPE OF ADVERSE ACTION	COMPENSATORY DAMAGES	PUNITIVE DAMAGES
Hercules Oil Co.	83-04	03/02/83	Sex (female)--pay, demotion, layoff, failure to recall	\$ 3,000	---
Peralta College	83-05	03/03/83	Sexual harassment--work-environment	\$20,000	---
Richard A. Enders, dba Enders Security Service	83-07	03/07/83	Race (Black)--termination	---	\$ 1,000
Ambylou (Watson)	83-09	04/11/83	Sexual harassment--work-environment, constructive discharge	\$15,000	\$35,000
Marriott Hotel*	83-10	04/07/83	Ancestry (Mexican-American)--work- environment harassment (verbal), constructive discharge	\$ 5,000	---
Northrup Services*	83-11	04/07/83	Retaliation--layoff for filing DFEH complaint	\$ 7,000	---
American Airlines*	83-15	06/02/83	Sex (female)--failure to hire	\$ 250	inclined to award -ordered further evidence
Carpenter's Joint Apprenticeship Committee	83-19	08/04/83	Race (Black)--termination	\$10,000	---

AMOUNTS OF COMPENSATORY AND PUNITIVE DAMAGES (CONTINUED)

\*Precedential

DECISION	NO.	DATE	BASIS AND TYPE OF ADVERSE ACTION	COMPENSATORY DAMAGES	PUNITIVE DAMAGES
City of Sacramento, Personnel Department*	83-20	09/07/83	Physical handicap (spondylolysis)--failure to hire	\$ 5,000	---
C. E. Miller*	84-02	01/06/84	Race (Black)--termination	\$10,000	---
Fresno Hilton Hotel*	84-03	01/06/84	Sexual harassment--work-environment	\$15,000	\$20,000
Louis Cairo*	84-04	01/06/84	Physical handicap (epilepsy)--termination	\$ 5,000	---
Hyman Goldberg, dba Dyn-Aura Engineering Laboratories	84-05	02/02/84	Pregnancy--refusal to reinstate after leave (termination)	\$ 1,000	\$ 2,000
Donald Schriver, Inc.*	84-07	03/01/84	Sexual harassment--work-environment, termination	\$ 7,500	\$20,000
Jack's Restaurant*	84-08	03/01/84	Sexual harassment--work-environment, constructive discharge	\$20,000	\$40,000
Alameda County General Services	84-09	03/01/84	Sexual harassment--work-environment	\$20,000	---

AMOUNTS OF COMPENSATORY AND PUNITIVE DAMAGES (CONTINUED)

\*Precedential

DECISION	NO.	DATE	BASIS AND TYPE OF ADVERSE ACTION	COMPENSATORY DAMAGES	PUNITIVE DAMAGES
Galusha Corp.	84-10	03/01/84	Pregnancy--denial of leave (termination)	\$ 2,000	\$ 7,500
Bee Hive Answering Service *	84-16	06/07/84	Sexual harassment--work-environment, longer hours, added duties, termination	\$35,000	\$50,000
Carnation Co.	84-17	06/07/84	Marital status (married)--failure to hire	\$ 7,500	---
Hansen Farm	84-19	07/05/84	Religion (Seventh Day Adventist)--failure to accommodate Sabbath (termination)	\$ 6,000	---
Hart and Starkey, Inc., dba Shakey's Pizza*	84-23	09/14/84	Sexual harassment--work-environment, constructive discharge	\$35,000	\$10,000
				\$35,000	\$10,000
				\$35,000	\$10,000
				\$30,000	\$10,000
			Total	\$135,000	\$40,000
Holiday Inn, Victorville	84-24	09/14/84	Sexual harassment--work-environment, constructive discharge; Retaliation--refusal to rehire for filing DFEH complaint	\$ 2,000	---

AMOUNTS OF COMPENSATORY AND PUNITIVE DAMAGES (CONTINUED)

\*Precedential

DECISION	NO.	DATE	BASIS AND TYPE OF ADVERSE ACTION	COMPENSATORY DAMAGES	PUNITIVE DAMAGES
Smitty's Coffee Shop*	84-25	09/14/85	Age (59)--termination	\$25,000	---
Lucky Stores (class action)	84-26	09/14/84	Sex (male)--disparate treatment in assignments	\$1,000 ea. (11 named complainants)	---
Fresno County*	84-27	09/26/84	Physical handicap (smoke sensitivity)--failure to accommodate	\$10,000	---
City and County of San Francisco	84-28	11/08/84	Physical handicap (abnormal EKG, prior neck injury) and retaliation for filing a DFEH complaint--failure to hire	\$ 5,000	---
Long Beach Unified School District	84-29	01/09/86 Revised)	Physical handicap (obesity, high blood pressure, perceived heart condition)--failure to hire	\$ 5,000	---
Kingsburg Cotton Oil Co.*	84-30	12/07/84	Medical condition (rehabilitated cancer) and physical handicap (cancer)--termination	\$40,000	---
Transit Casualty	85-02	02/08/85	Retaliation--refusal to rehire after layoff for filing DFEH complaint	\$25,000	\$25,000
La Victoria Tortilleria*	85-04	04/04/85	Sexual harassment--work-environment	\$40,000	\$60,000

AMOUNTS OF COMPENSATORY AND PUNITIVE DAMAGES (CONTINUED)

\*Precedential

DECISION	NO.	DATE	BASIS AND TYPE OF ADVERSE ACTION	COMPENSATORY DAMAGES	PUNITIVE DAMAGES
National Bindery	85-05	04/05/85	Ancestry (Hispanic)--failure to allow complainant to speak her ancestral language on the job	\$ 2,500	\$ 1,000
KNS Industries	85-07	05/02/85	Sexual harassment--work-environment, constructive discharge	\$45,000	\$40,000
Rockwell International	85-11	08/01/85	Physical handicap (spina bifida occulta)--failure to hire	\$ 1,000	---
Clean Steel, Inc.	85-13	09/06/85	Physical handicap (spondylolisthesis)-failure to hire	\$ 3,500	---
Rings Restaurant (Ferrell)	85-14	10/04/85	Sexual harassment--work-environment, termination	\$ 5,000	\$ 5,000
Duty Free Shoppers LAX, Inc.	85-15	11/14/85	Race (Black)--termination	\$25,000	\$30,000
Rings Restaurant (Stewart)	85-16	11/15/85	Sexual harassment--work-environment, termination	\$ 2,000	\$ 2,000
Rings Restaurant (Moore)	85-17	11/15/85	Sexual harassment--work-environment, denial of a raise and promotion, termination	\$50,000	\$40,000

AMOUNTS OF COMPENSATORY AND PUNITIVE DAMAGES (CONTINUED)

\*Precedential

DECISION	NO.	DATE	BASIS AND TYPE OF ADVERSE ACTION	COMPENSATORY DAMAGES	PUNITIVE DAMAGES
Rings Restaurant (Teutsch)	85-18	11/15/85	Sexual harassment--work-environment, termination	\$ 2,000	\$ 2,000
Del Mar Avionics*	85-19	11/14/85	Racial (Black) and sexual harassment--work-environment, write-ups, assignment changes, constructive discharge	\$15,000	\$35,000
County of San Diego Department of Health Services	86-04	03/13/86	Physical handicap (irritable bowel syndrome)--failure to hire	\$15,000	---

## APPENDIX B

### EXAMPLES OF AFFIRMATIVE OR GENERAL RELIEF--SAMPLE LANGUAGE FOR SETTLEMENT AGREEMENTS

#### General Policy

By \_\_\_\_\_, develop and disseminate to all employees and applicants a written nondiscrimination policy which prohibits discrimination because of race, color, religion, national origin, ancestry, physical handicap, medical condition, marital status, sex, and age. This policy shall express strong disapproval of discrimination, and shall establish procedures for the filing of employee complaints and the investigation and resolution thereof, including provisions for disciplinary action for wrongdoers and a prohibition against retaliation. The policy shall explain to employees their rights under State and federal law. Said policy shall be posted at all locations where employee notices are posted and at all locations where applicants obtain or file applications for employment with respondent. By \_\_\_\_\_, the policy shall be submitted to DFEH for approval.

By \_\_\_\_\_, provide training to all rank and file employees on respondent's nondiscrimination policies, on the procedures for filing, investigating, and resolving employee complaints, and on employees' rights under State and federal nondiscrimination laws.

By \_\_\_\_\_, provide training to all supervisory and management personnel on respondent's nondiscrimination policies and internal grievance procedures, on State and federal nondiscrimination laws, and on what these supervisors' and managers' duties and obligations are under said laws and policies.

By \_\_\_\_\_, notify all managers and supervisors in writing that a violation of respondent's nondiscrimination policies and/or State or federal law will result in disciplinary action up to and including termination.

#### Advertising/Recruitment

By \_\_\_\_\_, list job openings with the local California State Employment Development Department for a period of one year from the date of this agreement.

By \_\_\_\_\_, advertise job openings in local minority newspapers and on minority television and radio stations for a period of one year from the date of this agreement. Use the phrase "equal opportunity employer" in all advertisements.

By \_\_\_\_\_, send announcements of all job openings to minority and women's organizations, disability rights groups, and any community organization that may refer members of protected groups, for a period of one year from the date of this agreement.

#### Employment Applications

By \_\_\_\_\_, revise its employment application to eliminate all inquiries and references to an applicant's race, color, religion, national origin, ancestry, marital status, sex, or age, and all non-job-related inquiries concerning an applicant's physical handicap or medical condition. The revised application shall be submitted to DFEH for approval.

By \_\_\_\_\_, add a statement to its employment application that respondent is an equal opportunity employer and does not discriminate against applicants because of their race, color, religion, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age.

#### Hiring and Promotion

By \_\_\_\_\_, develop and submit to DFEH for approval an affirmative action program with goals and timetables for the hiring and promotion of (minority group or women). This plan shall conform to the Affirmative Action Guidelines for the federal Equal Employment Opportunity Commission, 29 CFR, Section 1608 (1979), which have been adopted by the California Fair Employment and Housing Commission. Said affirmative action plan shall be implemented within \_\_\_\_\_ days after approval by DFEH.

By \_\_\_\_\_, develop valid, nondiscriminatory, job-related selection criteria and procedures for the \_\_\_\_\_ position in accordance with the FEHA. These criteria and procedures must be validated in accordance with the Uniform Guidelines of the federal Equal Employment Opportunity Commission, 29 CFR, Section 1607, et seq. (1978), which have been adopted by the California Fair Employment and Housing Commission. Respondent is urged to hire an expert (e.g., a psychologist or psychometrician) to review the selection process and criteria to ensure job-relatedness and the goal of eliminating adverse impact on \_\_\_\_\_ (Blacks, Hispanics, women, etc.).

By \_\_\_\_\_, train all supervisory and management personnel involved in hiring or promotion decisions on making discrimination-free selections in accordance with respondent's antidiscrimination policies and State and federal law.

Effective the date of this agreement, respondent agrees that all hiring and promotion decisions will be reviewed by \_\_\_\_\_ (name and title) before an offer is made to ensure that a qualified candidate who is \_\_\_\_\_ (protected group) has not been passed over.

By \_\_\_\_\_, post all announcements for job openings for a period of \_\_\_\_\_ (week, month). All employees will be notified as to the location of the postings and of their right to apply for any available position.

By \_\_\_\_\_, develop and conduct career counseling or upward mobility training programs for \_\_\_\_\_ (minority groups or women).

By \_\_\_\_\_, post a DFEH Fair Employment Poster in a location visible to all applicants and employees.

#### Record Retention

Effective the date of this agreement, respondent agrees to retain all its employment applications for a period of \_\_\_\_\_ (years) from their receipt.

Effective the date of this agreement, respondent agrees to retain applicant flow data for a period of \_\_\_\_\_ (years).

Effective the date of this agreement, respondent agrees to retain all its personnel records for a period of \_\_\_\_\_ (years).

### Termination

By \_\_\_\_\_, develop and disseminate to all employees a written personnel policy that clearly specifies the work-rule violations that will result in termination or other forms of disciplinary action and the procedures under which such disciplinary action will be taken.

By \_\_\_\_\_, establish an internal appeal procedure for terminated employees.

By \_\_\_\_\_, establish an internal procedure that all termination decisions will be reviewed by (name and title) to ensure that discharge is warranted and that the appropriate procedures have been followed.

By \_\_\_\_\_ and again by \_\_\_\_\_, conduct an internal audit of termination statistics to determine whether a disproportionate number of protected groups are being terminated. If the statistics show adverse impact, respondent shall review all decisions to ensure the absence of discrimination.

### Neutral Reference

Effective the date of this agreement, respondent agrees to instruct its personnel office to limit its response to inquiries from prospective employers regarding the complainant to the following: 1) confirmation of the dates of complainant's employment; and 2) a description of complainant's job duties and the duration of various positions held. Respondent shall ensure that any employee designated to respond to outside inquiries regarding the complainant understands respondent's obligation to provide a neutral job reference for the complainant.

### Expunge Records

Effective the date of this agreement, respondent agrees to expunge from complainant's personnel records any indication of any disciplinary action taken based on the events of \_\_\_\_\_ (date), and shall treat complainant regarding his return to work and job references as if complainant had never been the subject of such action.

### Retaliation

By \_\_\_\_\_, develop and disseminate to all employees a written policy that prohibits retaliation against any employee who files a DFEH complaint or who opposes discrimination unlawful under the FEHA.

### Physical Handicap

Immediately upon the effective date of this agreement, respondent agrees to cease and desist from its practice of disqualifying all applicants for the \_\_\_\_\_ position who have \_\_\_\_\_ (e.g., spondylolysis, high blood pressure, etc.). Respondent shall also amend all its rules, standards, and procedures to eliminate such practice, and shall, from this date on, desist from any practice disqualifying such applicants that does not satisfy the requirements of the FEHA, FEHC decisions, and other applicable law.

Effective the date of this agreement, respondent agrees to notify in writing each job applicant whom it has tentatively decided to reject for physical and/or medical reasons of that decision and inform the applicant in writing that he or she may submit an independent medical opinion before a final decision is made. Respondent shall provide the applicant with a job analysis

or detailed job description of the position in question and respondent's doctor's medical diagnosis and evaluation that formed the basis for the applicant's rejection. Respondent shall provide a reasonable time period and procedure for the applicant to submit the independent medical opinion.

#### Reasonable Accommodation

By \_\_\_\_\_, develop and disseminate to all employees and applicants a written policy and procedures under which employees who have \_\_\_\_\_ (physical handicaps, religious work-rule conflicts, or who are pregnant) may be accommodated. This policy shall be submitted to DFEH for approval.

#### Sexual Harassment

By \_\_\_\_\_, develop and disseminate to all applicants and employees a written policy that prohibits sexual harassment in the work place. This policy should contain: 1) a statement expressing strong disapproval of such conduct; 2) a clear and comprehensive statement of what constitutes sexual harassment (conforming to the definition in the FEHC's regulations, California Administrative Code, Title 2, Sections 7287.6(a)(1) and 7291.2(f)(1)), and of the fact that it is prohibited by respondent's rules and by State and federal law; 3) a clear statement of any employee's right to complain about sexual harassment without retaliation, and a procedure for making such complaints; 4) a procedure for promptly, fully, and objectively investigating sexual harassment complaints and determining their merit; and 5) a statement that forceful and appropriate measures will be taken to punish offenders and to redress the harm done to their victims, and the guidelines and procedures for doing so. Respondent shall permanently post copies of its policy on sexual harassment at all locations where employee notices are posted and at all locations where applicants obtain or file applications for employment with respondent. By \_\_\_\_\_, the policy shall be submitted to DFEH for approval.

By \_\_\_\_\_, provide training to all rank and file employees on respondent's sexual harassment policy, on the procedures for filing, investigating, and resolving employee sexual harassment complaints, and on employees' rights to file sexual harassment complaints under State and federal law. No management or supervisory personnel shall be present at said training sessions.

By \_\_\_\_\_, provide training to all supervisory and management personnel on respondent's sexual harassment policy and internal complaint procedures, on employees' rights to file sexual harassment complaints and to be free of retaliation under State and federal law, and on supervisors' and managers' duties and obligations under said laws and policies.

#### Sex

Effective the date of this agreement, respondent agrees to eliminate all sex-linked job titles.

Effective the date of this agreement, respondent agrees to cease and desist from its practice of disqualifying all female applicants for the \_\_\_\_\_ position (e.g., dock worker, construction worker). Respondent shall also amend all its rules, standards, and procedures to eliminate such practice, and, from this date on shall desist from any practice disqualifying female applicants that does not satisfy the requirements of the FEHA, FEHC decisions, and other applicable law.

### Monitoring

Respondent agrees that it has the obligation to supply DFEH with any information or documentation to demonstrate that the terms of this agreement have been met.

APPENDIX C

SAMPLE  
SETTLEMENT AGREEMENT

RESPONDENT:

DFEH #:

COMPLAINANT:

EEOC/HUD #:

In exchange for the promises made by the Respondent contained in this agreement, the Complainant agrees to withdraw from consideration by any state or federal agency or court of law or other government entity any charge or complaint of discrimination or other claims relating to illegal discrimination, as referenced in the above-described complaint, which are now pending on Complainant's behalf against the Respondent, its officers, agents or employees.

Further, Complainant will not institute or cause to be instituted any action in state or federal court, or before any state, local or federal government entity arising from or attributable to any alleged unlawful practice of the Respondent, its officers, agents or employees arising from or attributable to the above-described complaint on the facts alleged in that complaint.

It is understood that this agreement does not constitute an admission by the Respondent of any violation of the Fair Employment and Housing Act.

The Department of Fair Employment and Housing participating in this agreement does not reflect any determination by the Department on the merits of the complaint. Further, the Department does not waive its rights to process any other complaint against the Respondent. The Department of Fair Employment and Housing's participation is limited to the specifics of the above-described complaint and the application of the Fair Employment and Housing Act (Act) to the circumstances described in this complaint. Any agreement or covenant beyond the circumstances of this complaint as affected by the Act, whether expressed or implied, is an agreement between the complainant and the respondent to which the Department of Fair Employment and Housing is not a party.

The Respondent further agrees that the Department of Fair Employment and Housing shall have the right under this Settlement Agreement to conduct a compliance review within one year of the effective date of this agreement, to determine whether such agreement has been fully obeyed and implemented, and to bring an action in the Superior Court of the State of California when it believes, on the basis of evidence presented to it, that any person is violating or about to violate this agreement. The Complainant and Respondent agree that this agreement may be used as evidence in a subsequent proceeding which any of the parties allege a breach of this agreement.

DFEH-500-02 (08/89)

In exchange for the promises of the Complainant contained in this agreement, the Respondent agrees to:

Within fifteen (15) days of the execution of this agreement:

- 1) Reinstatement the Complainant to the position of Welder I and to accord her all of the seniority, status, benefits, and other terms and conditions of employment she would have had if her employment had not been interrupted;
- 2) Pay the Complainant the gross amount of eight thousand dollars (\$8,000), of which one thousand dollars (\$1,000) represents wages and seven thousand dollars (\$7,000) represents compensation for Complainant's claims of emotional injury; and
- 3) Expunge from the Complainant's personnel records any indication of disciplinary action based on the events of August through September 1984, and to treat Complainant regarding her return to work and job references as if Complainant had never been subject of such action.

Respondent agrees that it has the obligation to provide the Department of Fair Employment and Housing with any information or documentation to demonstrate that the terms of this agreement have been met.

In signing this agreement the complainant and respondent acknowledge that neither the Department of Fair Employment and Housing, nor any of its agents or employees, has served as legal advisor to either the complainant or the respondent.

\_\_\_\_\_  
Complainant -

\_\_\_\_\_  
Date

\_\_\_\_\_  
Respondent -

\_\_\_\_\_  
Date

\_\_\_\_\_  
Department Representative -

\_\_\_\_\_  
Date

DFEH-500-02 (08/89)

SAMPLE  
SETTLEMENT AGREEMENT

(Complainant Not A Party)

RESPONDENT:

DFEH #:

COMPLAINANT:

EEOC/HUD #:

In exchange for the promises made by the Respondent contained in this agreement, the Department of Fair Employment and Housing agrees to close the complaint of discrimination listed above.

The Respondent further agrees that the Department of Fair Employment and Housing shall have the right under this Settlement Agreement to conduct a compliance review within one year of the effective date of this agreement, to determine whether such agreement has been fully obeyed and implemented, and to bring an action in the Superior Court of the State of California when it believes, on the basis of evidence presented to it, that any person is violating or about to violate this agreement. The Department and Respondent agree that this agreement may be used as evidence in a subsequent proceeding in which the parties allege a breach of this agreement.

It is understood that this agreement does not constitute an admission by the Respondent of any violation of the Fair Employment and Housing Act.

In exchange for the promises of the Department of Fair Employment and Housing, State of California, contained in this agreement, the Respondent agrees to:

- 1) Immediately upon the date of execution of this agreement, cease and desist from the practice of disqualifying all applicants for the Firefighter position who have spondylolysis; and
- 2) Within fifteen (15) days of this agreement, Respondent also agrees to amend all its rules, standards, and procedures to eliminate such practice, and from that date on desist from any practice disqualifying such applicants that does not satisfy the requirements of the Fair Employment and Housing Act, Fair Employment and Housing Commission decisions, and other applicable law.

Respondent agrees that it has the obligation to provide the Department of Fair Employment and Housing with any information or documentation to demonstrate that the terms of this agreement have been met.

The Department of Fair Employment and Housing participating in this agreement does not reflect any determination by the Department on the merits of this complaint. Furthermore, the Department does not waive its rights to process any other complaint against the Respondent.

\_\_\_\_\_  
Respondent -

\_\_\_\_\_  
Date

\_\_\_\_\_  
Department Representative -

\_\_\_\_\_  
Date

DFEH-500-03 (08/89)